THE OFFICE AND DUTIE OF EXECVTORS.

OR

A TREATISE OF WILS AND EXECUTORS, DIRECTED TO Teſtators in the choiſe of their Executors and Contrivance of their Wills.

With direction for Executors in the execution of their Office, according to the Law, and for Creditors in the recovery of their debts.

Expreſſing the Duty, Right, Intereſt, Power and Authority of Executors, and how they may behave themſelves in the office of Executorſhip.

With divers other particulars very uſefull, profitable, and behovefull for all perſons, be they either Executors, Creditors or Debtors.

Compiled out of the Body of the Common-law, with mention of ſuch Statutes as are incident hereunto.

LONDON,
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THE OFFICE AND DUTIE OF EXECUTORS.

The Preface.

AMidst the Readers of these Discourses; some not yet unfriendly may aske, perperhaps, Quorsum hæc, or Quorsum sic: why have we a tractate and discourse legall; or why in English and not rather in the Law language? To whom, yea, also to others, perhaps lesse inquisitive, it will be, as I thinke, a thing not unpleasing to heare some reason rendred, why I have set my head and hands to this worke so little in use with those of our profession; why also in English rather than in the language wherein our volumes of Law are for the most part, and well-nigh wholly written.

First, for the matter, viz. my thus comm nting or making a tractate upon a legall theme.

I have long and strongly conceived that 1.

the more Nobles, Gentlemen and others, ſhall be acquainted with the Law of the Land, and the juſtneſſe, equity, prudence and providence thereof, the more they will love it and affect it; Ignoti nulla cupido, *the want of knowledge of it cauſeth the leanneſſe of love to it. I herefore to bring Nobles and Gentlemen into acquaintance with the Law, is a meane as well to advance it in their eſtimation, as to advantage them by it.*

2. *I have long thought that we who are the Profeſſors of our Law have been more wanting to it than to theirs, the Civilians and Canoniſts, who have written very many volumes:* Spartam quam nactus es, hanc exorna, *hath been ſaid of old, and ſhould be aſſayed anew.*

3. *More wanting than others before us of our owne profeſſion have we alſo been as I think: yet as of old* Britton, Glanvill, Bracton, *beſides not printed*, Fleta *and* Ingham, *did lead the way; ſo ſince Maſter* Littleton, *and more lately Sir* Germin Perkins, Fitzherbert, Stanford, Crompton, Lambert, Kitchin, *Sir* Henry Finch, Dalton, *have troden*

troden this path so as it cannot be taxed with novelty or singularity. I mention not relaters or reporters of Iudgements and resolutions, nor meere abridgers, nor Authors of Books of Entries, expressing formes of Declarations and Pleadings, &c. because these have troden another, though for the Students and professors of the Law, a very profitable path.

4. The tax and increpation of our late learned and judicious Soveraigne upon us the Professors of the English Law, as being wholly in effect addicted to our owne private gaine and advantage, with neglect of the publike, had some strong operation upon me, howsoever upon others, setting for divers yeares past my pen on worke, specially in Summer vacations upon divers particular subjects, whereof this is one and the first borne.

King Iames in his Preface to his Booke against Tobacco.

5. To this I may adde the Crownes expectation of somewhat legall to bee published and set forth from time to time, as appeares by the speciall Patents successively granted, and renewed for the sole printing of books of

Law. There is one such in force at this present, and another long hath been in remainder and expectancie to take effect upon the expiration thereof.

6. *And now to adjoyne* Sic to hæc, viz. *the reason of my English writing to that of my writing upon a law theme. First, receive the said late Kings judgment touching both, ex-*
March 1609. *pressed in one of his speeches printed. Thus. I wish, saith he, the Law written in our vulgar language; For now it is in an old mixt and corrupt language, onely understood by*
Note. *Lawyers, whereas every subject ought to understand the Law under which he lives, &c.*

7. *Herein,* Andrew Horne, *one sometime*
In his Mirror of Justice. *of our profession, agreeth with the said late King, saying,* Abusio est que les leges ovesque lour enchesons, ne soient scrus & conus del touts: *It is an abuse, saith he, that the lawes with their grounds be not knowne by all.* Ergo, *to bee in a tongue understood by all.*

8. *More plainly and fully doth that our both well learned and well descended* St. German, *sing in consort with our said late scientious*

entious King. For he first brings in the Do- Lib. 1. cap. 24.
ctor of Divinity, saying, that hence-forth he will take more paine than before he had done, to know the Lawes of England; for that knowledge is Multum necessaria & clericis & laicis, imo omnibus in hoc regno commorantibus, etiam in foro conscientiæ. *And this being in his first booke written in Latine: After writing his second booke in English, he expresseth that he so did for this reason,* viz. *To the end that it might be understood by all.*

Which of us hath not heard it objected, 9.
that we the professors of the Law seek to hide and secreat the knowledge thereof under this dark and distasted language, wherein the law is for the most part written, not that I hold it any just excuse for the nescience or negligence of any, that our books are not in English. Since, first, it were easie for any diligent and intelligent man, specially if acquainted with the right French language, to understand our broken or brackish French in a few dayes. Secondly, there be both statutes and some other law-books in English, which

are neglected by the most. Thirdly, though
36.Ed.3.c.15. *care hath beene in Parliament in* Edward *the third his time, that Lawyers should plead, that is, argue and debate causes in English, which was often desired by the Nobles and Commons, till at last assented and*
2.& 3. Phil.& Mar. cap. 6. in fine. *enacted; and in Queen* Maries *time care was taken that the Commissions of Purveyors should be in English, to the end that all subjects from or of whom they would take, might both see them to be persons authorised, and so also in what manner they are directed to use their authority, according to the Princes pious and princely care that his subjects should not be abused by his Officers: Yet for this affaire, of having all the Law-volumes speak English, I have not heard nor read of any desire or endevour in Parliament. Fourthly, If the Annals and Reports were in English, they are so replete with debates about formes of Writs, Returnes, Pleadings, Essoignes, Imparlances, Protections, Vouchers, Aydpriers and Counterplees of both, and the like, as would easily distaste and discourage any not intending to professe and practise the law,*

from

from verſing much in them, or paſſing through them. This therefore, as I thinke, would not much effect the expreſsed deſire.

The thing in my judgement fit and fruitfull to produce that good effect, would bee to have extracts of materials of the Law; and that not without ſome good choice and ſelection, compoſed in way of diſcourſe, or tractate expoſitory, and that in Engliſh.

I cannot well ſee or comprehend how any one legall part or theme may be more uſefull to and for the generality of men, and conſequently more generally expetible and wiſhed for, than the office of executors. For who almoſt is there, who either is not, or may not be an executor or adminiſtrator, or at leaſt hath not, or may not have to doe with them, either to receive from them, or to pay to them debts or legacies. Or who is there above Forma pauperis that may not be a teſtator, or will maker, to the guidance of whom even in the choice of his executors, and contrivance of his will, it cannot but be materiall to know the office and duty, the right and in- 11.

tereſt,

tereſt, the power and authority of executors, yea, of each one executor where there be divers; yea, to know who may be made an executor, who not; who can make one, who not; how he may be faſhioned, generally or ſpecially; what ſhall come to him, what cannot be given from him; yea, what goods or chatels ſhall goe from him, though not given from him. Beſides the knowledge for thoſe others neceſſary of the ſafeſt wards or locks for executors. Their Scilla *and* Charibdis, *and the beſt advantage for creditors, &c. towards or againſt them. To mee conſidering what parts of law were moſt behovefull to bee communicated to all willing Readers, none appeared which could challenge of this the precedence, and therefore I gave it the firſt and leading place. Thus my owne thoughts. But how farre this diſcourſe may bee profitable to any, and to how many,* aliorum ſit judicium. *How many know no more of theſe, than of the way of a ſhip upon the Sea?*

12. *Laſtly, theſe are not intended for the learned*

learned of our profession, who have drawne or can draw out of the same fountaine which I did, and so need not my helpe; but for their sakes who are not professors of the Law: yet so as if any young Students may in any part receive fruit by my labour, I shall not grudge or repine at their so doing. Bonum quo communius, eo melius.

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THE OFFICE OF EXECVTORS.

THe things considerable touching Executors, may all in effect be reduced to these three Heades, *viz.* *Introduction*

1. Their Being.
2. Their Having.
3. Their Doing.

By the first, I intend their creation, or constitution with, the incidents thereto. By the second, their Interest, Fruition, or Possession. By the third, their Managing and execution of their Office. This last was, and is the thing principally in my intention, and the chiefe

ayme of theſe Diſcourſes; but neceſſarily it muſt have ſome Ingredients, ſome Concomitants, and ſome Conſequents; as he that travelleth from *London* to *Yorke* to ſpeake with *I.S.* muſt needs paſſe by & thorow other Townes and Villages, and ſpeake with divers other perſons in his journey and returne. To come firſt to the firſt; therein wee will conſider theſe ſixe things.

1. *Whether an Executor and a Will be ſuch Relatives, that one cannot be without th'other; and therein of the ſeverall kinds of Wills.*

2. *How, and by what words an Executor may be made and created.*

3. *How he may be in ſpeciall manner (different from the generall) faſhioned, limitted or qualified.*

4. *Who may make, or be made an Executor, and who not.*

5. *What one may give or bequeath by Will, what not.*

6. *How a Will or Executor once made, may be unmade, and what ſhall amount thereunto, viz. To a revocation totall or partiall, what to new Publication.*

Of the relation betweene a Will and an Executor.

AS to the firſt, the very name of Executor purporteth in the generall, one that is to execute

execute ſomewhat, or to whom the execution of ſomewhat is committed, or recommended. In our particular therefore, an Executor of a Will muſt needs be ſuch an one to whom the execution and performance of another mans Will after his death is commended, or committed: Or who is conſtituted and authoriſed by the Teſtator, or Will-maker, to doe him that friendly office. Hence it followes neceſſarily, that a Will is the onely bed wherein an Executor can be begotten or conceived, for where no Will is, there can be no Executor. And this is ſo conſpicuous, and evident to every low capacity, that it needs no proofe nor illuſtration. On th'other ſide, though much be written in name of a Will, many Legacies bequeathed, and many things appointed to be done: Yet if no Executor be named, here is no Will; for theſe two be ſo relative, and reciprocall, as that one cannot be without th'other; if no Will, no Executor; if no Executor no Will. Yet here two Cautions are to be affixed. 1. That a mans minde, will, and intent, touching the diſpoſition of his goods, being declared, although for want of naming an Executor he die inteſtate, ſo as Adminiſtration is to be committed: Yet for that here is not onely an inchoation or inception of a Teſtament, but ſo farre a progreſſion therein, as *Teſtatio mentis*, that is, the manifeſtation of

Plowd. com. 182. a. in Wyndh. and Dorcies Caſe, ſo expreſly ſaid.

Teſtamentum quaſi teſtatio mentis.

the party deceaſed and owner of goods; therefore this minde and intention of the Inteſtate being notified and made knowne to the Judge, who is to commit Adminiſtration, is uſually annexed (as I take it) to the Letters of Adminiſtration, and meete ſo to be, as a direction, for, and to the Adminiſtrator; as well as the Will fully, and perfectly made, but refuſed to be proved by the Executor, which is uſuall. Another Caution is, That where a man ſeiſed of Land in Fee-ſimple, diſpoſeth the ſame, or part thereof by his Will in writing, this ſtandeth good for the whole or part, according to the difference of Tenure, although no Executor be named; ſo as the party dieth Inteſtate, and Adminiſtration is to be committed as touching his goods, and yet hath a Will as touching his Lands. This may ſeeme ſtrange, that the reaſon thereof is an Act of Parliament, inabling to diſpoſe of Land by Will in writing. And for that Land, is not properly Teſtamentary, neither hath the Executor (if any be) any thing to doe or intermeddle therewith; and therefore is the making or not making of an Executor, nothing pertinent to the validity or invalidity of this deviſe or diſpoſition of Land by Will. So, as though where there is not *Teſtatio mentis*, there is not *Teſtamentum*; yet may there be the firſt without the later.

Having

Having ſeene that bequeſts of Legacies without making of Executors, doth not amount to a Will. Let us now conſider, whether the ſole making of Executors in the name of a Will, without giving any Legacie, or appointing any thing to be done by his Executors? Whether I ſay, this be, or amount unto a Will or not? Since hereupon the matter nothing is willed, and conſequently nothing reſts to be executed by the Executors, whoſe Office, as hath beene ſaid, is to execute the Will, Minde, and Intent of their Teſtator, and *Vbi non eſt Teſtatio mentis, non eſt Teſtamentum*, ſaith the *Cannoniſt*. For anſwer hereunto, confeſſing that indeede to be the Office of an Executor; I yet conceive confidently, that in the Caſe above put, there is a good Will, and as a Will, it is to be proved and approved, for theſe Reaſons. Firſt, for that the maine and principall part of an Executors Office, and that which moſt concernes the ſoule of the Teſtator (as our Bookes ſpeake) is the payments of his debts. Now, who knowes not, but that the very making of an Executor, is the conſtituting of ſuch a perſon, who is to pay all debts; and for that cauſe and end, principally is to have, and enjoy all the goods and chattels of the Teſtator, and all ſummes of money to him owing, as the naming of *A.* and *B.* Executors is by implication a gift, or

Summ. Silv. fo. 32. b.

donation to them of all the goods, chattells, credits, and perſonall eſtate of the Teſtator, and the laying upon them an Oligation to pay all his debts, and making them ſubject to every mans ſute and Action for the ſame. And if the Law ſpeake thus much ſenſe; *Quod neceſſario ſubintelligitur non deeſt*; What neede then the party expreſſe it in his Will? If hee had willed more than this, as to have given this or that in way of Legacy, it had beene needefull for him, ſo to have ſet downe in his Will, but there is no meere neceſſity that every man ſhould give Legacies: the eſtates of many will not doe more than pay their debts, nor oft-times ſo much, ſo as if they ſhould give any Legacie, it muſt bee a dead and void gift. And ſuppoſe a man have much more, and intendeth all to his wife, brother, or ſiſter, or other friend, his debts being by ſuch perſon, paid ſince the very making of that party Executor, without any more, amounteth to thus much, and effecteth this; what needeth then more words? *Fruſtra fit per plura quod fieri poteſt per pauciora*; as we often ſpeake touching legall paſſages; It is needleſſe to write foure lines where two be ſufficient. Nor is *Teſtatio mentis* here wanting; ſince the Teſtator hath made knowne who ſhould have the Adminiſtration of his goods for payment of his debts, and it is to be preſumed he had

no

no more speciall Will; since hee did not declare more, but left his Executor further to have and doe, *Prout lex postulat*: And who can say here is nothiug to execute? Is the suing for, and collecting of debts due to the Testator, and the payment of debts owing by him nothing? Nay, it is rather *in hoc negotio*, the *Vnum necessarium*. Besides, the making of an Executor is a designment, of a person to be the Testators assigne to whom, and by whom divers, things may bē feasible by vertue of covenants, bonds, or other assurances, as after where we come to shew how the Executor represents the person of the Testator will appeare. Also of one, who, as our Bookes often speake, is to dispose the Testators goods for the best advantage of his soule, but insteede of that (since as the tree falleth so it will lye or rest) I will say, as is most for the honor and reputation of the Testator.

Of the kinds of Wills.

NOw Wills are of two kinds, or may be two wayes made, *v.z.* either by writing, or *Nuncupative*; that is, by words not put in writing, during thē Testators life: for after the Testators death, this *Verball* Will must be reduced to writing, and have the seale of the Ordinary, or Judge spirituall thereto affixed; and then is it as effectuall, and of as good validity

4 H. 6. 1. 10. 8. 4. 1. If it be written and brought to, and approved by the Testator in his life, it is a Will in writing.

14.H.8.5.vide 3.H.5.1. M. 15.& 16. Eliz.

lidity as if it had beene in writing in the Teſtators life time; and ſo doth the Common Law allow and approve thereof. But I adviſe all to make Wills by writing, and not to leave them to the doubtfull fidelity, or ſlippery Memory of witneſſes: for, as of Leaſes Parroll hath beene ſaid, that they be Leaſes perjured, or of perjury:

So of Wills Parroll may be feared. Beſides, many times a man doth ſpeake and declare this or that, as part of his Will, which his wife, child, or friend diſſwading, he letteth that purpoſe and part of Will to fall, & departs from it: Yet witneſſes wiſhing it to ſtand, will perhaps affirme it as part of the Will. As for a Will, gift, and diſpoſition of Land of inheritance, if it be not fully written before the death of the Teſtator or Doner, ſo farre (at leaſt) as concernes the diſpoſition of Land, it cannot be for that part made good, by reducing it to writing after his death, as for goods and chattels it may. Yet if it be written before the death of the Teſtator, though it never be brought to him, or reade to him, after the writing thereof, it is good enough: and that not onely for Land, as the Caſe in King *Ed.6.* his time was, but alſo for goods and chattels, ſo as there be an Executor named. But whether ſhall wee ſay, that this is a Will *Nuncupative* or in writing? And ſurely I thinke, that this

6.E.6.Dy.72.

this is a Will in writing, and not verball only, though it want ſubſcribing; for wee know, that many cannot write their names, but onely markes, and what is that? Nay, ſuppoſe one want hands, and cannot write ſo much as his name; yet doubtleſſe this man may make a Will in writing, that being written by his direction, as his Will which he dictated: nor is the ſubſcribing of the name of the maker, any eſſentiall part of a Deede, much leſſe of a Will, which needes not ſealing as a Deede doth. Now put we the caſe on the other ſide, that many Bequeſts or Legacies be named in a Will, and many things expreſſed to be done, but no Executor is named in the writing, onely by word of mouth, *A.* and *B.* be named Executors. This I thinke confidently is no Will in writing, but *Nuncupative* onely; for that one eſſentiall part of the Will, *viz.* the making of Executors, is wanting in the writing. Nay, the appointing of him Executor, who is named in a note, left with *A. B.* is no ſufficient making of an Executor, ſaith the *Summiſt.* And of ſuch *Nuncupative* Will, Maſter *Perkins* reaſonably ſaith, that it properly hath place, when one ſuddenly taken with ſickneſſe violent, dares not ſtay the writing of his Will, for feare of prevention by death; and therefore prayes his Curate and others, to witneſſe what his Will is. To this

Tit. de Teſtam. Summ. Silv. fo. 443. b.

So if he ſurvive and live long time, not cauſing it to be a written, or atteſted by witneſſes; me thinkes it ſhould not ſtand as his Will.

Will not written, there must be seven witnesses, and such as come not by chance; but are especially called for that purpose, saith the *Summest.*

Idem supra fol. 444. b.

What shall amount to a making one Executor, or what words requisite thereunto.

HAving before made it to appeare, that the being of an Executor, is an essentiall part of a Will, and so *de esse*, and not *bene esse*, onely of a Will or Testament. Let us now see, First, by what words an Executor may be made. Secondly, *De modo*, In what manner it may be done. How the power and authority of Executors may be limitted or divided. As to the first, though one do not expresly by Will, name or appoint any to be Executor: Yet if by any words or circumlocution, he recommend or commit to one or more, the charge and office which pertaines to an Executor, it amounts to as much as the ordaining or constituting of him or them to be Executors. As if he declare by his Will, that *A. B.* shall have his goods after his death to pay his debts, and otherwise to dispose at his pleasure, or to that effect. By this is *A. B.* made Executor, as was conceived by the Judges, in the late Queenes time. And long before that, was it held, that if one doe onely Will that *A. B.* shall have the Administration

If *A* be made Executor, and to him and *D.* some goods be divised to dispose for his soule, *D.* is by this an Executor for these. 39. *H.* 6. 27. b. 28 *H.* 15. & 16. *Eli.* 21. *H.* 6. 7.

ſtration of his goods, he is thereby made Executor. Yea, in the ſaid late Queenes time, one giving divers Legacies, and then appointing that his debts and Legacies being paide, his wife ſhould have the reſidue of his goods; ſo that ſhe put in ſecurity for the performance of his Will. By this without more, was ſhee an Executor, as was held by three *Iuſt. viz. Manwood*, *Harper*, and *Mounſon*, in the Lord *Dyers* abſence. And ſo alſo where an Infant was made Executor, and *A.* and *B.* Overſeers, with this, that they ſhould have the rule and diſpoſition of his goods and payment, and receipt of debts, untill the full age of the Infant; by this were they held to be Executors in the meane time. And if *A.* be made Executor, and the Teſtator after in his Will, expreſſeth that *B.* ſhall Adminiſter alſo with him, and in aide of him: Here *B.* is an Executor as well as *A.* and if *A.* refuſe, *B.* alone may prove the Will as Executor; notwithſtanding it be onely ſaid, that he ſhall Adminiſter with *A.* and in aide of him. Thus many wayes, and by divers words of implication, and may be made Executor, although not expreſly ſo named by the Will. But if *A.* be made Executor, and *B.* a Coadjutor, without more, Hee is not by this an Executor with *A.* as in King *H.6.* his time was held, nor hath ſuch Coadjutor, or an Overſeer any power to Adminiſter 21. H.6.A.4.

ſter, or intermeddle otherwiſe, than to counſell, perſwade, and adviſe; yet I thinke hee may, and in conſcience ſhould ſo doe; and if that will not prevaile to rectifie negligences, or miſcarriages in Executors, hee ſhall well performe the truſt repoſed in him, if he complaine in the Spirituall Court, or Court of Conſcience; and it is reaſon, as I thinke, that ſo doing upon juſt cauſe, his charges be borne out of the Teſtators ſtate, or the Executors purſe, who otherwiſe would not be reformed.

21. H 6. 6. 34. Ed. 3. F. Exe. 121. 29. Ed. 3. 39

How an Executor, or his Executorſhip may be limited or qualified in ſpeciall manner, different from the generall.

NOw let us ſee how this making of an Executor may be ſpecially qualified. And firſt the time may be limited, when he ſhall begin to be Executor, and that, either certainely, or with ſome reference to contingencie. Secondly, the creation may be conditionall. Thirdly, it may be partiall, or dividedly, and not entirely.

As to the firſt, one may appoint *Io. At.* to be his Executor a yeare or more time after his death, and this is good. So alſo, if *A.* appoint *B.* his ſonne to be his Executor when he ſhall come to his full age; and in the meane

Vide Greshoke and Foxe, Plowd. A. and B. made Exec. but ought not to meddle during the life of A. and good. 32 H. 8. Br. 155.

meane time he dieth Inteſtate. Againe, one may make and appoint the Executors of *A.* to he be his Executors; and then if he die before, *A.* is Inteſtate, untill *A.* die. This creation may alſo be conditionall, and the condition may either be precedent or ſubſequent. In the time of King *H. 6.* one named *A.* and *B.* his Executors; and if they would not take it upon them, then *C.* and *D.* ſhould be his Executors: and then there *A* and *B.* refuſed; and the queſtion was, whether in ſute againſt the debtors of the Teſtator, *A.* and *B.* ſhould joyne with *C.* and *D.* as where foure Executors being named, and two refuſe, and the other two prove the Will, yet all foure muſt be named in ſutes againſt the Teſtators debtors, as was there admitted. But in the principall caſe it was reſolved that the ſute ſhould be onely in the name of *C.* and *D.* for that the appointing of them to be Executors, if *A.* and *B.* refuſed did imply, that then they onely ſhould be Executors. And here all foure were never made, nor intended to be Executors, but *A.* and *B.* upon a condition ſubſequent that they ſhould not refuſe: and *C.* & *D.* upon a condition precedent, *viz.* if *A.* & *B.* did refuſe. It is uſuall to make one or more Executors, conditionally, that they put in ſecurity to pay Legacies, or in generall to performe the Will; nor was it ever doubted, as I thinke, 3. *H. 6. fo. 6.*

but that this was good: yet I should advise, that such condition be plainely thus expressed, *viz.* either thus; that if *I. S.* doe put in security, &c. by such a day, that then hee shall be Executor, else not: or thus, *viz.* to make him Executor conditionally; that before he doe Administer (Funerall perhaps excepted) hee shall put in such security; else perhaps he being Executor till the Condition broken, in that meane time may have disposed of all, or most part of the Testators estate. In the late Queenes time, there was a Case remarkeable to this purpose: One Willed, that if his wife suffered *I. S.* to enjoy Blackeacre (being belike part of her Joynture) for three yeares, then she should be his Executor, or else *A. B.* should; and the question was in the Common Plees, whether presently before th'end of the three yeares, shee were Executor, or not till shee suffered the Land to be enjoyed three yeares: and it was held by all the Judges, but the Lord *Anderson*, that she was presently Executor, untill she should disturbe *I. S.* &c. for upon that done; it was agreed, that the Executorship, would, by vertue of the Condition be transferred from the wife to *A. B.* But now during these three yeares might she have disposed of all the goods of her husband; yea, within one of these three yeares, and lesse time, and then have broken the Condition, and have left to *A. B.* a dry Executorship.

P. 33, Eli. Alce Francis her case.

Now

Now to the third Point, one may divide his Executors power three wayes, *viz.* Really, Locally, or Temporally: Really thus. Hee may make *A.* his Executor for his plate and houſholdſtuffe: *B.* for his ſheepe, and cattle, *C.* for his Leaſes and ſtates by extent, *D.* for his debts due to him, and ſo divide the power and Adminiſtration of his Executors at his pleaſure. He may divide them alſo, or their power Locally, *viz. A.* for his goods in *Com. Buck. B.* for thoſe in *Com. Oxon.* and *C.* for thoſe in *Com. Berk.* He may alſo divide them in time; *viz.* his wife, or any other perſon to be Executor during her life, or during the minority of his ſonne, or ſo long as ſhee continues widdow, and after his ſonne to be Executor. So of like limitations, or diviſions, either for time, place, or things, wherewith they ſhall intermedle. Nay, doubtleſſe one may be made Executor for one particular thing onely, as touching ſuch a Statute, or Bond, and no more; and thereof good uſe may be made, as I thinke, thus. Many have Bonds, Statutes, and Recognizances, for warranty or enjoying of Land, or freeing, or ſaving harmeleſſe from incumbrances in generall or particular: Now he which hath theſe, ſelling the Land, may by Letter of Attorney lawfully aſſigne thē to the party who buyeth the Land or Leaſe; but this notwithſtanding, the

19. H. 8. 19. H. 8. Dyer. 4. Hill. 33. Eliz. in Com. b.

32. H. 8. Br. 115

the interest remaines in him who selleth, and by his outlawry, they may be forfeited or by him released any Bond to the contrary notwithstanding; and if he dye, the interest in Law will be in, and goe to his Executors, and in their names; onely Sute or Execution may be had and maintained.

Qye. If not *Assets* in Law when obtained.

Now then, if the Vendor, besides assignement make as to this Statute, Recognizance, or Obligation, onely the Vendee Executor; By this, the interest, after death of the party, will be in him actually and really to his more safety, since none but hee can release or discharge, nor any other name needs to be used to sue, or take benefit thereof. But *Quæst.* If the Vendee, his Heires and Assignes may be made Executors, so as that securitie, shall go to them one after another without renewed, making of Executors. Thus if the party make no other Executor, he dieth Intestate, as to the rest of his estate, and as to this specialty onely, shall have an Executor, and must have a Will proved: and incase he doe make another Will for his state residue; there must be two Wills proved. But in th'other case where by one onely Will, one is Executor for one part of the estate, and another for another; there being but one Will to be proved, one proving of it sufficeth. And though in the premises of a Will two be made Executors joyntly

joyntly and equally; yet there may bē a *Proviſo*, that one ſhall not meddle during th'others life, ſo as they ſhall be Executors ſucceſſively, and not joyntly; and thus alſo to other purpoſes aforeſaid, a ſubſequent cauſe or *Proviſo*, may make the partition and diviſion of authority. But if the *Proviſo* or clauſe ſubſequent, be meerely contrary to the Premiſſes, it will be void; as where two were made Executors, with a *Proviſo*, or cauſe, that one of them ſhould not Adminiſter his goods. This was held voyde for repugnancy by *Brudnell* and *Engleſield* Juſtices. But *Fitzherbert* Juſtice was of minde, that it was not voyd, nor utterly repugnant. For the other might joyne in ſutes, though not Adminiſter; and Juſtice *Shelley* was of a thir dopinion different frō all the reſt, *viz.* that here was a repugnancy; but the laſt clauſe ſhould controll the Premiſſes, and ſo this one onely ſhould be Executor.

33. H. 8. Bro. Exec. 155.

19. H. 8, Dy. 3. 4.

Who may make an Executor.

SOmē perſons may be unable to make Wills, and conſequeutly Executors; for that is all one: whoſoever may make a Will, may make an Executor, and he that may make an Executor may make a Will. There be nineteene ſeverall kinds of perſons unable, as the *Canoneſts* ſay, to make Wills, but with

many of them we will not intermeddle, becauſe wee finde no mention of them in our Law. The perſons principally, and moſt uſefully to be conſidered of by us, are either the defective in underſtanding, as Infants, Idiots, Lunatickes, and the like, or defective in power or intereſt, as women covert or married, perſons out-lawed, attainted, convict, or excommunicate. Some touch we will give of others, as Aliens, Corporations, Villens, Monkes and Fryers. As for Infants and women covert, becauſe much is to be ſaid of each of them and their Adminiſtrations, wee will forbeare to treate of them in this place; but after will doe it of each ſeverally.

3. Eliz. D. 203. 204. To begin with an Idiot, naturally he is not able to make a Will, as was reſolved in the Spirituall Court, becauſe he wants the uſe of Reaſon to conceive what it is fit for him to Will; nor doth the Common Law oppoſe this as I thinke.

A Lunaticke having *Lucida intervalla*, that is, ſome ſeaſons of enjoying his right minde and freedome from his Lunacy, may in thoſe times of his right minde make a Will, and Executors, elſe not, for even one by age or ſickneſſe become of *non ſanæ memoriæ*, is unable to diſpoſe of Lands or goods.

Vide plus la Perk, 5. 6. 33. H. 8. Dy. 55. 56. Vide 26. Ed. 3. 63. lib. Ass. 396. One deafe and dumbe borne may make a Grant, ſaith Maſter *Perk*. if he have underſtanding,

ſtanding, which is hard, as hee confeſſeth, conſequently much more a Will: but in the time of K. *Hen.* 8. it is left a demurrer, whether a Deede by ſuch, be good or not. If but mute, he may wage his Law, and atturne by ſignes, and ſo perhaps by ſignes declare his Will. 44. *Aſſ. p.* 36.

18. *Ed.* 3. 53. 26. *Ed.* 3. 63. So in effect. 44. *Aſſ. p.* 36. *T.* 31. *Eli. Paſcatia de Fountaines* Caſe.

An Alien may make, or be an Executor, ſo as he be not an Alien enemy, for ſuch cannot ſue; as in the late Queenes time was held; but there the doubt was, whether a ſubject of *Spaine* were at that time to be held an enemy, no warre being proclaimed betweene the Kingdomes, though hoſtility exerciſed.

As for perſons Attainted, Convicted, or Out-lawed, it will be ſaid, that theſe can have no goods of their owne, and conſequently, they can make no Wills nor Executors; and it is not to be denied, that we finde it pleaded ſometimes by Executors, that their Teſtators ſtood out-lawed. But firſt it is cleare, that all and every of theſe, may have goods as Executors to others, which neither are forfeited by Attainder or outlawry, nor deveſted by marriage, or Villenage. Therefore as touching them, they may make Teſtaments. And that all theſe ſorts of perſons may be Executors, is alſo evident. So alſo touching Villens, Monkes and Fryers, who can have no goods to their owne uſes. And that one attainted of

33 Eliz. in Bar. felony may have an Executor, appeares by the Case in the late Queenes time, wherein it was long debated, whether such an Executor might maintaine a writ of Error, or not to reverse the attainder of the Testator: And as for other Out-lawries, the Plea thereof by the Executors, that their Testator was, and died out-lawed, proves not a nullity of the Will, or Executorship: for then they might have pleaded, that they were never Executors. But it tends to this, that no goods did, or could come to them for satisfaction of the debts by reason of out-lawry; yet it hath beene delivered, not of old onely in many Bookes, but by some of late, that debts upon contract, where the defendant may wage his Law, are not forfeit by out-lawry, nor uncertaine damages for trespasse in battery, or false imprisonment, &c. *Quær.* Of breach of Covenant. But goods taken away by a trespasser, may yet be forfeited by the Attainder or out-lawrie of him from whom they were taken, for that the property in right still appertained to him, and he might have taken them againe, wheresoever he found them, therefore the action for this shall not come to his Executor, but for th'other, not forfeited it may.

29. Ass. P. 63. 49 Ed. 3. 5. 50. Ass. P. 15. 33. H. 6. 27. 9. Eliz. D. 262. Contra. Co. lib. 4. fol. 95. 19. H. 6 47. 30. Ed. 3. 4. 16. Ed. 4. 7. 5. Ed. 3. 53. 6. H. 7.

15. H. 7. fol. 7. Whether an Excommunicated person be able to make a Will or not, may be some doubt, since *Keble* denieth him abilitie to present

sent to a Church, and in the very Point antiently the opinion of *Canonists* hath beene Negative, but more lately grew Affirmative. *Sum. Silvest. tit. Testam.*

Who may be Executors; more, 42.E.311.

AN Excommunicate person cannot Sue, that is, proceede in Sute as Executor till he be absolved, there being danger of Excommunication to all that converse with him; but this makes not a nullity of his Executorship, nor over throwes the Sute, but stayes it onely from proceeding untill absolution. As for persons attainted or outlawed, wee have before spoken Affirmatively in way of proofe, that they may make Executors for continuation of the Executorship, So of Aliens, and others before. Recusants convicted at the time of the death of any Testator are disabled to be his Executors.

21.H.6.30. A Clarke attaint may be an Executor by Past. Iust.

Pasquier de Recherches. But an Alien enemy cannot sue as Executor. P. 31.H.3. *Iac. cap. 5.*

Whether Corporations, Compound, or consisting of divers persons may be made Executors or not; I doubt. First, because they cannot be Feoffees in trust to others use; secondly, they are a body framed for a speciall purpose; thirdly they cannot come to prove a Will, or at least to take an oath as others doe.

What a man may give or dispose by his Will.

HAving cõsidered of the makers of executors by Will, and of them so made. Let us now

consider what by this Will may be disposed, given, or bequeathed. And first, hee, who himselfe is an Executor, cannot by his Will, give, or bequeath to any other the goods, chattels, or credits, he hath as Executor, the property not being altered, for that he hath not them properly as his own, or to his owne use; onely he may make a continuation of the Executorship, and his Executor shall have them as Executor to the first Testator, as was resolved by the Judges of both Benches, in the late Queenes time. And if he be Administrator, the bequest is then also voide, nor then will they goe to his Executor, but to a new Administrator; but on his death-bed he may give them by Word or Deed, though not by Will. Next if a man have debts owing to him, as many have much, it is considerable, whether by way of bequest in his Will, hee can give away these to any from his Executors. And doubtlesse he cannot effectually in Law, they being not subject to assignement unto any except the King. So as, if he give such a debt to *A.* and such to *B.* yet must the sute for them be in the name of the Executor, and so also the Release or Acquittance for them: and not in their names to whom the bequests is. But when they be received, if there be no debts to pay, the Executor ought to deliver them to the party, to whom the bequest is,

Bromly. Pert. Grantham. Plow. Com. f. 525.

Hill. 20. Eliz.

At any time in his life he may alter the property.

So 48. E. 3. f. 14. 15.

Where the bequest was to one of the Executors, it was held that the other Executor might release it.

If sufficient other wise to pay all one, as if none.

is, and therefore may be compelled in Court of Conſcience, or in the Spirituall Court. Therefore the Caſe of the bequeathing money payable upon a Morgage, is in this manner, to be underſtood to be good, and not otherwiſe as I take it. He that is joyntly with any other eſtated in Lands or goods, can give no part by his Will, but all will ſurvive, but by Act in his life hee may diſpoſe of his part, and the Aſſignee may diſpoſe of his moiety by Will; yea though it be halfe an Horſe or Oxe, that cannot be divided. So of a Leaſe of Lands, or Tithes, or Grant of goods to two, *habendū*, one moyety to the one, and the other moyety to th'other; each may give his moyety by Will. But if one be poſſeſſed, or eſtated for yeares by Leaſe, Wardſhip, or Extent, &c. in the right of his wife, or have the next avoidance of a Church in her right, he cannot by Will give or bequeath any of theſe; but notwithſtanding they will remaine unto his wife upon his death; but yet his Gift, or Grant of them, taking effect in his life time, would binde his wife, and carry away the intereſt from her. If one be Tenant for the lives of one or more; others, as oft times men take Leaſes for lives of yonger perſons than themſelves; th is cannot be by Will diſpoſed of, for that it is no chattell, nor is it within the Statutes of Wills, for that it is no ſtate of inheritance.

48. E. 3. p. 14. 15. 11. Eliz. Fitz. tit. Cond. 9.

Where both eſtated joyntly by one Grant.

Differences betweene joyn-tenants & Tenants in Common, holding by ſeverall Grants.

Another kinde of Tenants in Common.

ritance. Therefore let the party looke to convey it in his life time, leſt it goe to an Occupant, *viz.* him who firſt ſhall enter: If it be a State in Land, hee muſt either make Livery, have a bargaine and ſale inrol'ed or covenanted to ſtand ſeiſed to the uſe of his wife, or ſome of his blood, or make a Leaſe for yeares, determinable upon thoſe lives: Good it be by bargaine and ſale for yeares, if the thing be in Leaſe, that ſo without Inrolement or Attornement the Rent may paſſe, elſe a bargaine and ſale may be made for a moneth, or ſuch like time; and then a Releaſe or Grant of the reverſion, in ſtead of Levery & Seiſin. But if a man have a Leaſe for never ſo many yeares, determinable upon life, or lives; that is, if ſuch or ſuch live ſo long (which unskilled perſons call a Leaſe for lives) this State may well enough be given, and diſpoſed by Will, becauſe it is but a chattell. If a man ſeiſed in Fee, or in Tayle of Land having Corne growing upon it, and by his Will doe give the Corne, and die before ſeverance; this is a good bequeſt, becauſe the Corne ſhould have gone to the Executor. So it is alſo of a Parſon touching his Glebe, and a man ſeiſed in the right of his wife, or his owne right, but for life. But as for trees growing upon the ground; theſe can no otherwiſe be given by Will, then as the Land it ſelfe upon which they

Stat. Merton. cap. 2. videa poſſint Legari tam de domibus quam de aliis, &c.

they grow, may be given of, which matter, as not pertaining to the Office of Executors, *viz.* How, and in what manner Lands may be given by Will, I entend not to treate in these discourses.

Quæ. If the trees may be devised by the Statute of Wills, without giving the Land it selfe.

Of the Revocation and Countermand of Wills and new Publication.

HAving considered of the making of Wills and Executors. Let us before wee come to the *Probat*, consider of Revocation, for that may take away the force of a Will rightly made. A Will therefore having two parts, *viz. Inception*, which is the making, and *Consummation* which is the death of the Testator or maker of the Will, there is power in him at any time before death, to revoke or alter his Will at his pleasure. Consider we therefore of Revocations, and also of new Publications, or *Reaffirmance* of Wills in whole or in part. As therefore a Will may bee made by Word. So also may a Will made in Writing be by Word revoked or disanulled: for since every making of a later Will is a Countermand, and suppression of the former Will, and since a Will may be made *Nuncupatively* or by Word, and so by making a verball Will, one may revoke a Written Will. It will thereupon follow that one by Word

Omne testamentum morte consummatur. See the pleading of it by making a later Will. *Bl. Intest.* 323. *b.* & 641. *a.*

may expresse the alteration of his minde, thus farre that the Will by him formerly made, shall not stand, but be revoked and annulled; and this will stand and be effectuall, so as if he after dye without making any new Will, or new Publication, or Reaffirmance of the former, he dyeth intestate or without will. As a Will may bee wholly revoked, so also in part: Hereabout a good resolution was in a *Kentish* Case, where one *Ryese* by his Will in writing did give some Gavel-kinde Land, to one *Harrison*, and five dayes before his death, said in the presence of witnesses, that this gift should not stand, and that he would alter it when he came home, desiring them to beare witnesse of his Revocation. Now before he came home he was killed by the said *Harrison*, who caused the Will in writing to be proved, and after he was attainted and hanged for the murther, and his Sonne by the Custome of *Kent*, (*viz.* the Father to the bough, and the Sonne to the plough) entred into the Land, and this manner of Revocation, by word onely was held sufficient, although the Will in writing were not cancelled nor defaced. And the like resolution for verball Revocations is implyed in the Case of *Forse* and *Hembling*, where it being resolved that a *Feme* Covert, or married woman, by word Countermanding and Revoking her Will formerly made, when she

24. Eliz. Dy. 310 b.

M. 28. & 29. Eliz. Co. lib. 4. f. 60.

ſhe was a ſole or unmarryed Woman: this was not effectuall, nor of force, by reaſon of her Coverture, taking away the freedome of her Will, hereby it is implyed that another who hath freedome of Will may by Word ſufficiently revoke a Will in writing; and ſo was it ſince alſo admitted in the Caſe between Sir *Edward Mountague* and *Ieoffryes*, touching the Will of Sir *Io. Ieoffryes*, but there a difference was conceived betwixt ſaying, I will revoke my Will, which only expreſſed a purpoſe or intent, & therfore was no preſent Revocation; and ſaying I doe revoke it, or it ſhall not ſtand, or my heire ſhall have my Land, which croſſed the gift of it by the Will. And as Wils may be wholly or in part revoked ſo may alſo the executorſhip of one or more of the Executors, and yet the Will may ſtand in all the other parts, ſo as there be any one Executor or more unrevoked: but if all be revoked, then the whole Will is revoked, becauſe no Will can ſtand without Executors: and this Revocation may be by Word onely, without being expreſſed in the Will or any other writing. But I would wiſh all to expreſſe ſuch revocation in the foote of the Will, or that the name or names of the Executor or Executors ſo revoked be expunged or blotted out of the Wil, and that this be done in the preſence of ſome witneſſes to teſtifie the act and intent of the Teſtator.

7. H. 6. fol. 13. M. 38. 39. Eliz.

Againe, Revocations may be by act in Law as well as in fact, or by direct and expresse termes, as in the said Case of *Mountague* and *Jeoffryes*, where Land being devised by Will, and the Devisor after making a feoffement, though there were some defect in the Livery, to make it effectuall, or if he made a bargaine and sale, that was never inrolled or granted the reversion, but no attornement had, so as the Land passed not, yet in all these Cases the Will or gift of Land stood revoked: But in Case he had onely Covenanted that he would have made such an estate, and not done it, this was held to bee no Revocation. And so by some, in case he doe but make a Lease, leaving the Fee simple, as it was, but of this *Quare*; And if a difference may not be betwixt making a Lease for yeares, and a Lease for life, which altereth the Freehold. If a Lease for twenty yeares be bequeathed to *I. S.* and after the Testator, maketh a Lease for fifteene yeares, reserving a Rent, I take this to be no Revocation of the bequest; but if the Testator after this Will made, take a new Lease for a longer terme, so as the former Lease is surrendred in fact or in Law, this must needes be a Revocation of the bequest, or at least an adnullation thereof. and that although the bequest were generally of his Lease, not mentioning the number of yeares; for this which he now hath

vide 6. F. 6. Dy. 74 & 3. & 47. & Mo. 43. a.

hath, is another Leaſe, and not that which he had at the time of the making of the Will. So, if one give his blacke gelding by Will, and after, before his death, he ſelleth or giveth away that Horſe, and buyeth another blacke one, this new gotten Horſe ſhall not paſſe by the Will, becauſe it was not the Teſtators, at the time of making his Will. So alſo, if the Crop in the Barne be bequeathed in *October*, and the party lives till that time twelve month, having ſold that Crop and Inned a new, this later Crop ſhall not paſſe by the Will, and the former cannot.

Againe, as revocation may be by alteration of the State of the Deviſor, in the Land Deviſed; ſo may it alſo be by alteration, in ſome caſe of the ſtate or quality of the perſon of the Deviſor. As if a woman ſole make a Will, and after take a Husband, this without any more, as is reſolved in the ſaid caſe of *Forſe*, and *Hembling*, doth worke a Revocation, or adnullation of the Will, for that elſe it ſhould be irrevocable, ſince ſhee having loſt the freedome of her Will, cannot actually and directly make a Revocation, as we before have ſhewed. But notwithſtanding her Will be revoked, yet in caſe her Husband before or after marriage, with her were bound or Covenanted, to performe this womans Will, if he ſo doe not, by payment of the legacies therein bequeathed, his

Bond or Covenant ſtand good, and be ſutable
M.25.26. Eliz. againſt him, as was adjudged touching the Will of *Elizabeth Smaleman*, marryed after her Will made to one *Wood*. Who firſt was bound to performe it: yet another caſe there is of Alteration in the ſtate of the Teſtators perſon, which makes no Revocation of his Will. As if he being of ſound minde and ability, make a Will, and after becommeth franticke. In this caſe this is no Revocation. So as his Will ſtands till his death irrevocable, if he recover not. Now of a Will Revoked, there may be a reviver by a new Publication, and therof now.

Of new Publications.

HAving ſhewed how a Will may be revoked, and ſo loſe its force; let us now ſee how without making a new Will, that ſo revoked may be revived, and ſet on foote againe.
M.38.39. Eliz. de ba. reg. And that is divers wayes: as, Firſt, by a *Codicell* annexed after thereunto, as was reſolved betweene *Betford*, and *Barnecot*, in the Kings Bench. Secondly, by adding any thing to the Will, or making a new Executor, &c. Thirdly, by expreſſe ſpeech or word, that it ſhould ſtand or be his Will; as I conceive, to have beene the better opinion in the ſaid caſe of *Mountague* and *Geoffryes*, wherein yet was much

much difference of opinion, both touching Revocation and new Publication. If a man having made a former Will, doe make a latter which is more than a bare Revocation; yet if afterward lying upon his death-bed, and ſpeechleſſe, both theſe Wills be delivered into his hand, and he required to deliver to one of his friends about him, that Will which he would have to ſtand, and to keepe in his hands th'other; he thereupon delivereth to the Miniſter or other his neighbours, the firſt made Will, retaining in his hands the latter, as was done in the time of *Edward* the third. Here the former Will, though made voyde many yeares before, by the latter, is revived, and ſhall ſtand as the Parties Will. But now put the caſe that a Bequeſt at the firſt is voyde, yet by Publication after, it may be made good, as if one give to *Sar.* his wife, a peece of Plate or other thing, and hath no ſuch Wife at the time, but after marryeth one of that name, and then publiſheth his Will againe; now this ſhall bee a good Bequeſt. So if one Deviſe Lands or Goods, which one hath not; If he after doe purchaſe the ſame, and then ſay that his Will before made ſhall ſtand, or be his Will. It ſhall be a good Will and Bequeſt, for this is in effect a new making. And though moſt of the precedent caſes, be of Revocation of particular parts of the Will, and not of the totall:

44. Aſſ. p. 36.

44. Ed. 3. fol. 33.

3. & 4. P. M. Dy. 143.

totall: Yet firſt, be it conſidered that, that part ſo revoked was in effect the ſubſtance of the Wills: Next, it is eaſily diſcerned that if one part be revocable, ſo is another alſo; And thus Revocation may ſpread it ſelfe over the whole; nay, doubtleſſe the whole, *Uno flatu*, may be revoked, as well as by parts, even as a fagot may be put wholly into the fire, as well as ſticke by ſticke. And as the *Velleities* or diſpoſing parts of the Will, are revocable and revivable by new Publication as aforeſaid, ſo is alſo the conſtitution of Executors. As if one of the Executors names be ſtricken out, and afterwards a *ſtet.* be written over his head by the Teſtator, or by his appointment, now is he a revived Executor. So if the Teſtator expreſſe by word, in the preſence of Witneſſes that the party put out ſhall yet be Executor; but now I meane, where the Executors name is not ſo blotted out, but that it may be read and diſcerned; for elſe the *ſtet* is upon nothing, and if the Verball reaffirmance ſhould renue his Executorſhip, then muſt the Will be partly in writing, and partly *Nuncupative*, his name not being to be found in the written Will.

Of

Of the State of things instantly upon the Testators Death, before any Will proved.

Here we will consider these severall things.

1. *What is wrought by a gift of a thing certaine and knowne, as the White Horse, the Red Cow, &c.*
2. *What by a Bequest to an Executor.*
3. *What wrought by a Release in the Will, to a Debtor.*
4. *What by making a Debtor, or Creditor, an Executor.*

AS touching the first, *viz.* the bequest of a Chattell reall, or personall, which the Testator had in possession, notwithstanding that, if the said Testator had by his Deede or writing, or but by word in his death-bed, or before given these his goods, and dyed before they had beene taken, he to whom they so were given, might have taken them; yet in this case of gift by Will, neither can the Legatee, *viz.* he to whom they are bequeathed, either take them,

1 & 2. P. & Ma. Dy. 110. a. & 139. b. vide Co. 8. f. 95. & 96.

them, or recover them from the Executor, or a stranger taking them; by any Suite at the Law for that he hath no property in them; yea if the Bequest be to himselfe, who is made Executor, be it of Lease, Plate, Cattell, &c. They shall not vest nor settle in him as Legate, but as Executor, untill expresse, or implyed election, but made to have and take the same by way of Legacy. And the reason in both cases is this, *viz.* That the Lawe preferres, debts, and the satisfaction of them before Legacies, and ties Executors also to that rule, and therefore will transferre nothing from or out of the Executor, till he having considered of the State of the debts to be paid, and goods out of which the same are to be paid, shall finde that safely this or that legacy may take effect without making any defect in payment of debts, or drawing upon him and his owne goods any damage or losse as a waster: and thereupon shall assent to such Legacy. Thus now is the Law taken; but heretofore some opinion hath runne otherwise, *viz.* That hee to whom any Bequest was made of a thing knowne and certaine, might take it without any assent of the Executor: and that when to the Executor himselfe any good or Chattell moveable or immoveable was bequeathed. In case there were otherwise sufficient goods, for satisfaction of debts, the same should instantly

Of the second. See *Co.* 10. *f.* 47. 65 a. So resolved *pas. Trin.* 37. *Eli.* in *b. a. M.* onely *Gaw. contr. Portman. pl. & Simes deft.* See more of this *Tit.* Legacy: and of the assent of one Executor onely.

27. *H.* 6. 8. Of late perhaps some single or suddaine opinions may also have runne that way, but in *Portmans* case the point was divers times argued, and then adjudged as before.

ſtantly upon the Teſtators death, without any act or election, by the Executor be transferred into, and unto him in his owne right, as a Legacy, and not remaine in him as Executor. As for ſummes of money bequeathed, or ſo much in Plate, or Ringes, it is evident that they muſt be had by the delivery of the Executor: Yet hath the Legate ſuch an intereſt before delivery, as that dying before payment it will goe to his Executors. But as I take it, no ſuch to whom any thing certaine is given by Will, can make any gift or grant of it, before the Executor have aſſented to his having thereof; Nor perhaps will the Executors aſſent, after the grant have ſuch relation, as to make good the grant precedent; why ſo, yet? more then an attornement of a Leaſſee, which is alike aſſent to the grant of another? And *Quere* if by the out-lawry of the Legatee, before the Executors aſſent, this thing bequeathed be forfeited.

To be bought.

Qua. of this ſee more after *Tit.* Legacy, thereabout

If without juſt cauſe an Executor will refuſe to aſſent he is compellable by Law Spirituall or Court of Conſcience, yet if Spirituall Court preſſe to doe where is juſt cauſe to ſtay, a *Prohibit.* lyeth, *ut Credo*, for ſince executors ſtand liable to recovery of debts againſt them by Common Law. It is reaſon that Law enable them to keepe wherewith to pay. And here yet note ſome ſeeming oppoſition in Law

for where before great difference was shewed betweene a Devise or Bequest, and a gift or alienation executed in ones life time; Yet the Lord *Dyar* reports it to be resolved, that where a Lease for yeares was made upon condition, that the Lessee should not Aliene in his life time, that yet a Bequest of this Lease by his Will, was a breach of the Condition as being an alienation in his life time.

3. Of a discharge by Will to a debtor some question may be whether to perfect and make good this, so as the debtor may plead it in Barre, there be not requisite, as in the former, an assent of the Executor. On the one side, since this giving is a forgiving, for he to whom it is bequeathed, cannot otherwise have it, then by way of retainer, it may probably be said, that here needes no such assent of the Executors, as in the case where any thing is to be transferred; for here is rather an extinguishment, and an exoneration then a passage of a Chattell by way of *Donation*: On the other side it is probable that it being but a Bequest, and so a Legacy, since debts are in Law and Conscience, to be satisfyed before any Legacyes, that therefore the Executor having not sufficient otherwise to satisfie his Testators debts, may sue for this debt, and refuse to suffer it to passe away as a Legacy. And to this opinion

opinion doe Fencline, as beſt for Creditors; and ſatisfaction of debts is by Law reſpected as an act greatly concerning the Teſtators ſoule. But ſome will perhaps make a contrary doubt, that although there be an aſſent of the Executors to this diſcharge, yet it will not amount to a legall releaſe, for that a debt, at leaſt, if it be by ſpeciallty, cannot be releaſed but by Deede, and a Will is no Deede, for a Seale is not neceſſary thereunto, though it be fit and convenient; whereto I give this anſwer, that a Will though it be not properly and legally a Deede, for it may be good enough without a Seale, which is an eſſentiall part of a Deede, yet hath it the force and effect of a Deede: for as a Releaſe cannot be made but by Deede, ſo neither can an Eſtate or Intereſt though but for yeares in Tithes, Advowſons, Commons, Faires, and like things be granted or aſſigned otherwiſe then by Deede, yet it is cleare, that ſuch a ſtate for yeares in any of theſe may be given by Will, as well as a Leaſe of Land, which proves a will to have the force and effect of a Deede.

Not *de eſſe*, but *de bene eſſe*.

Of making a Debtor or Creditor, Executor, and firſt of the Debtor made Executor.

SUppoſe we then that *A.* and *B.* being made Executors, the Teſtator was indebted to

A. twenty pounds, and *B.* was indebted to the Teſtator twenty pounds, how doe things ſtand preſently upon death. Firſt, it is cleere, that the debt of *B.* to the Teſtator ſtands in Law extinct, this making of him Executor, being a Releaſe in Law. Therfore let Debtees, take heed of making their debters Executors: And yet doubtleſſe me thinkes ſuch a debter made Executor ſhould hold himſelfe reſtrained in Conſcience, from taking benefit thereof, if (the debt remitted) there ſhall want to ſatisfie either debt or Legacie of the Teſtator: and I doubt whether a Court of Conſcience may not juſtly ſo order; the Teſtator, being perhaps ignorant of this point in Law, that this debt ſhould be releaſed by making the Debtor Executor. And what is ſpoken of making the debtor Executor, generally the ſame is to be underſtood of making any one of the debtors Executor, where there be many joynt debtors: and ſo alſo where many Executors be made, and but one of them is debtor to the Teſtator, for they cannot ſue without making him who is the debtor, alſo a plaintiffe, which hee cannot doe againſt himſelfe. The like Law touching Actions of treſpaſſe or account: Yet of old, where one made his Bayley one of his Executors, together with *A.* and *B.* who brought an action of Account againſt the Bayley, in their two

21. *H.* 7. 31. *Plow. Com.* 185. *cont. Danby & Clarke.* 8. *E.* 4. 3. And may be granted that he ſhould account before the Ordinary for it.

Yea it ſeemes *Plowd.* 186. *a.* the Law was taken to be as *ſupra.* 8. *E.* 4.

Though he never adminiſter. 21. *E.* 4. 3. 8 1. 11 *H.* 6. 38.

2. *R.* 3: 20. *per Starkey & 22. per Vavaſor.*

9. *H.* 5. 13. Left a demurrer in treſpaſſe by all, againſt the Executor, who was treſpaſſor.

names

names onely; Justice *Herle* held the action well brought: This was in the beginning of King *Edward* the third his time; but the contrary hath beene since resolved, some also have held, that though in the life of this Executor, who was a debtor, he could not be Sued, yet after his death, the surviving Executors might sue his Executor: but that cannot be, as I take it, for that the debt was utterly extinct, by the making of him Executor; as if the Testator had released it to him, yea, though this Executor dyed before he did ever Administer or prove the Will. And like extinguishment of the debt, if the Creditor marry with one of the Executors of the debtor, yet was there an Action of debt maintained *temp. Edward* 3. By the Husband and Wife, against the Husband, and other Executors upon an Obligation by the Testator to the Wife, before her marriage. But if a debtor take Administration of the goods of his Creditor, this mee thinkes should not discharge him, but that his debt should stand as assetts in his hand because the intestate did no act to free him from the debt.

3.E.3.23.
6.H.4.3.
8.E.4.3. *Clake.*
21.H.7.31.
20.E.4.17.
21.E.4.3.61.
*Plowd.com.*36
Plowd. com. 185.
11.H.4.f.83.84.
31.E.3.*Fitz. Ex.*82.

The Debtor or Creditor made Executor.

THis making of the Debtee Executor, and so the party who both should pay and be payed,

payed, the debt giveth him clearely power to pay himselfe before any other, if his debt be by Specialty or upon Record. Nay, some have held that so much of the goods of the Testator shall be altered in property out of the Executor, as Executor, into him as Creditor, but how that can be, I cannot see: For whether shall it be satisfyed out of the Lease and Chattells reall, or personall, whether out of the Corne in the Barnes, Cattell in the Fields, Plate or Housholdstuffe; this till some election made by this Debtee Executor, cannot be knowne, nor shall be effected by any operation of Law, preventing the Executors election, in taking his satisfaction, where and how he will. For certainely, as an Executor hath election to pay, which Creditor he will first, so hath he election to pay and satisfie himselfe, by what part of the Testators goods he will, yet perhaps if there be ready money in the Executors hands, there shall be an alteration of the property of so much thereof as was owing by the Testator to the Executor. And if there come not to the hands of such Executor, sufficient to pay himselfe, he may have an Action of debt against th'other Executor, or the Heire, as by some hath beene conceived: yet let it be well advised of, whether, if he doe Administer at all, and specially, if he pay himselfe any part, he have not thereby barred

Plow.com. 185. By all the Judges, but *Brooke* Cheefe Just. *Plowd.* 185.*b.* Whesethe goods be of more value, which shall be so altered?

See *Plow.com.* 544. the like of a Legacy of twenty pound given to the Executor.

Or if the goods amount in all to no more then this debt,

See *Plow.com.* 185.1 3.*H.*8.15. 11.*H.*4.83. 12.*H.*4.21. 20.*E.*4.17. 21.*E.*4.3.

red or disabled his Suite for the Residue. But if he refuse to Administer at all, it were very unreasonable that he should not be able to sue the other Executors, for so a Debtor might by subtilty make his Creditor an Executor with others, and take a course that his goods should come onely into the hands of those others, so as the Debtor could not pay himselfe; and consequently, if he could not sue the other Executors, he should thus be stripped of his debt by a sleight. *Quære*, if he may bring the action in the name of the other Executors, onely the Will being proved in his name, as well as in the names of the rest, or whether the Action shall be brought in his name also, and then he be severed at his owne prayer. But against the Heire there is none to joyne with him, and him may he sue, if he have not Administred as Executor; this admitted, that the Bond extend to the Heire, which without expresse words it doth not, though for the Executor it be otherwise.

Plow. 184. b. 185. a. He is barred for he cannot apportion his debt.

12. *H.* 4, 17. He may sue the Heire if the Heire bound, and he have not sufficient goods as Executor.

Thus having considered of the State of things before and without any Will proved or other act done by Executors: wee should now come to the point of proofe, but two things, pertinent to it, are in Order precedent.

1. *What may be done by or to an Executor before proving of the Will.*
2. *Of Refuſall, and the things incident thereunto.*

Before probate, what may be done by or to Executors.

AS to this it is cleare, that before proving of a Will by the Executor, he may ſeiſe and take into his hands any of the goods of the Teſtator, yea enter into the houſe of the Heire if not locked ſo to doe, and to take the ſpecialties of debts and generally he may doe all things, which to the Office of an Executor pertaineth (except onely bringing of Actions and Proſecution of Suites.) He may pay debts receive debts, make acquittances and Releaſes of debts due to the Teſtator, and take Leaſes or acquittances of debts owing by the Teſtator: Yea, if before ſuch proving, the day incurre for payment, upon bond made by or to the Teſtator, payment muſt be made to or by this Executor, though no Will be proved upon like payne of forfeiture, as if the Will were proved. Alſo an Executor may before *Probate*, ſell or give away any of the goods or Chattells of the Teſtator. And whereas the aſſent of an Executor, is neceſſary to the ſetling and Execution of a Legacy, as before hath beene

9. E. 4. f. 33. 47. 7. H. 4. 18. They cannot ſue till they have the Will under the ſeale of the Ordinary.

beene shewed. So as if one give me his white Horse, or blacke Cow, by Will, or any other well knowne thing, I cannot after his death take it, though I come where it is, but am punishable by action of trespasse, at the Executors suite, if he doe not assent; yet an Executor before the Will proved, may give this assent, and it will stand good. Yea, although he dye after any of these acts done, the Will being never proved by him, yet doe these Acts so done, stand firme and good, as I take it. Yet (as I finde) an Executor, making his Will, and dying before he had proved the Will of his Testator: his Executor may not prove both the Wills, and so become Executor to both the Testators. But in case the goods were, after debts paid, bequeathed to the Executor, his Executor may take Administration of the first Testators goods, with the Will annexed, as by Doctor *Drury*, was in the late Queenes time declared to be the Law and course of the Court Spirituall, to which credit was given by the Judges of our Law, and the Court of *Star-Chamber*: for though the Booke doe not mention it to have beene in *Star-Chamber*, it is elsewhere so reported: Yea an Executor, for goods of the Testator taken from him, or a trespasse done upon the Lease Land, or a Distrayning, or Impounding of goods or Cattell, may mainetaine before the

Wray. 23. Eliz.

22 & 23. Eliz. Dy. 372.

Dy. in Plow com. 281. Case of Greisbrooke & Foxe.

Will be proved, Actions of Treſpaſſe, or *replevin* or *detinue*, for theſe Actions ariſe upon the Executors owne poſſeſſion. But before the proving of a Will, an Executor cannot maintaine a ſuite or action of debt or the like. And the reaſon is, for that therein hee muſt ſhew forth the Will proved, under the ſeale of the Ordinary. And ſo, as I take it, muſt it be, if he bring any Action for treſpaſſe done, or goods taken in the Teſtators life time, ſo as the Teſtator himſelfe was intitled to the Action, and it growes not upon the Executors poſſeſſion. I finde that an Executor granting the next avoydance of a Church which to him came from the Teſtator; the Grantee maintained a *Quare impedit*, without ſhewing forth the Will: But the Executor himſelfe might ſo have done, as of his owne poſſeſſion before the Will proved, and ſo without ſhewing it under the ſeale of the Spirituall Court, as well as Actions of Treſpaſſe, or *Replevin*, for goods taken after the death of the Teſtator: yet in the Principall caſe of *Greyſbrooke* and *Foxe*, which was an Action of *Detinue* by the Executor, for goods taken or detained after the Teſtators death, the Plaintiffe did ſhew forth the Will proved. But that proves not any neceſſity thereof, or that if the Will had not beene proved, it could be no hurt to ſhew it forth, ſo upon his own contract for the Teſtators goods

34. P. & Ma. Dy 135. a.

Dyer in Plow. com. 281. a.

Plow. com. 275. b.

as if the Executor ſell Cattell or other goods of the Teſtator, before the Will proved, hee may for the money payable, mainetaine an action of debt, before he have proved any Will: and in this and the action of Treſpaſſe, there is no neceſſity of naming him Executor. Alſo on th'other ſide, an Executor may well enough be ſued for debts of the Teſtator, before the Will be proved; for he may not by his owne Act of delaying the *Probate* of the Will, keepe off Suites, except he will refuſe in due manner, that ſo Adminiſtration being granted, there may be ſome body Suable by the Teſtators Creditors, for debts by him oweing. And the uſuall plea of the Defendant, to eſtrange himſelfe from the Teſtament, is to ſay that he neither is Executor, nor hath Adminiſtred as Executor. So as if he either be Executor *De jure*, or *De facto*, by his owne act of Adminiſtring it ſufficeth.

Of refuſall to prove the Will, and therein of Adminiſtration foreclouding refuſall.

NOw touching this other point, fit to be thought of, before wee meddle with the *Probate*, *viz.*, Refuſall to prove, we will thereabout conſider theſe ſeverall parts, *viz.* Firſt how, and in what manner refuſall may or muſt be. Secondly, in what Caſes, or in reſpect

of what acts one named Executor hath lost or determined his election of refusall or acceptance. Thirdly, of what effect and operation the refusall is, what difference, where all the Executors refuse, and where but some or one of them. Fourthly, what relation it hath.

3. *Hen.* 7. 14. Now touching the first; the Ordinary, before committing Administration where a Will is made, and Executors named, if hee know of it, must send out Proces against the Executors, to come in and prove it, and if they doe not come, they are to be excommunicate; but if they doe come, if they nor any of them will prove, by reason of such refusall, the Ordinary may commit Administration; perhaps also they may be appointed Executors at a time future, and not presently. Now refusall cannot be verbally, or by word, but it must be by some act entred or recorded in the Spirituall Court, and therefore must be done before some Judge Spirituall, and not before Neighbours in the Country; for that is not effectuall. Yet Sir *Ralph Rowlett*, making the Lord Keeper *Bacon*, *Catlin*, Chiefe Justice, and the Master of the Rolles, Executors, they wrote a Letter to the Ordinary, that they could not attend the Executorship, and therefore wished him to commit Administration, who did so; making every of their Refusall, and this was held good: So as a Lease being

9. *Ed.* 4. 47.
3. *Hen.* 7. 14.

Plow. com. 184.

9. *Ed.* 4. 33.
See *Plow.* 184. a.
If Dettee made Executor, sue the Ordinary for the debt; this amounts to a refusall of the Executorship.

by

by that will bequeathed to *Catlin*, and he after this refusall entring and assigning it to one, and the Administrator, assigning it to another, it came in question betweene them whether had best right, and Judgement was given for the assignee of the Administrator against *Catlins* assignee, whereas, if the Refusall had beene void, *Catlin* had continued Executor, and so his title had beene better. First, in case the Ordinary himselfe, be made Executor, there saith the Booke hee may refuse before his Commissary, and so was it there pleaded for the Arch-Bishop of *Canterbury*, who was made Executor to Sir *William Oldhalle*.

M. 28 & 29. Eli. Inter Brooker & Carter. in Ba. com.

9. Ed. 4. 33. The Booke calls him Cardinall of *Canterbury*.

What shall be such a medling or Administring by an Executor that he cannot refuse after.

AS to the second, where an Executor hath Administred, he cannot afterwards refuse, because he hath already accepted of the Executorship, and so determined his election: at least the Ordinary ought not to accept of such refusall, but should compell him to take upon him the Executorship, as the Law was taken both in the time of *Ed.* 4. and of Queen *Elizabeth*: Yet if the Ordinary doe admit one to refuse, notwithstanding that he have Administred: this standeth good, as it seemeth, conceived by the Judges in the time of *Hen.* 6. for

9. Ed. 4. 47. Selling Land as Executor is Admin.

Dyer in Case of *Greisbrooke & Foxe. Plow. com. 280. b.*

Pas. 7. Eliz.

36. Hen. 6. f. 7. 8.

for there the Executor commanded one to take goods of the Teſtator, out of the hands of *I. S.* who did accordingly; and afterward the Executor refuſed before the Ordinary, and Adminiſtration was committed to the ſaid *I. S.* who brought an action of treſpaſſe againſt the party ſo taking the goods from him, and there the refuſall and committing adminiſtration were admitted to be good: ſo perhaps *Factum Valet quod fieri non debuit.* And it well may be that the Ordinary did not know of the Executors, ſuch intermedling at the time when he did admit of his refuſall. After Refuſall and Adminiſtration committed, the Executor cannot goe backe to prove the Will, and aſſume the Executorſhip: but if onely upon the Executors making default to come in upon Proces, to prove the Will, the Adminiſtration be committed, here the Executor may yet at any time after come and prove the Will, and ſo undoe the Adminiſtration: as was in the late Queenes time reſolved, betweene *Bale* and *Baxter*.

Mich. 27. 28. Eliz.

But what if after refuſall, it ſhall appeare to the Ordinary, that the Executor had adminiſtred before his refuſall, ſo as had it beene then knowne, the Ordinary ſhould not have admitted him to refuſe. Whether now may he revoke his adminiſtration, (for it is revokeable) and inforce the Executor to proceed to proving

of

of the Will. And surely me thinkes hee may, for that the Executor by Administring, had determined his election, and accepted the office of Executorship; now he cannot both except and refuse. Besides, we know that Creditors may maintaine their Sutes against him, having once Administred, the Common Plea to free himselfe, and shew that hee is not the party suable for the Testators debt, being that he neither is Executor, nor ever did Administer as Executor, wherefore hee having administred, it will be found against him. Now it is not congruous, that in the Spirituall Court there should be no Executor, and yet in the Courts of *Westminster* there should be an Executor. But since this Point of Administring is so materiall to the Point of being admitted, or not admitted to refuse; we will here consider in this place, briefly, what shall be said to be an Administration by an Executor, determining his election, and disabling his refusall, and what not. 1. Some will perhaps conceive, that the act of the Executor in the fore-mentioned Case, where he onely commanded *I. S.* to take goods of the Testators out of a strangers hands, was no Administration: and it is true, that in that Booke it is passed in silence, and not expresly said to be an Administration.

Bures Case, *in com ba. A.* being Executor did administer, and yet would not prove the Will. *B.* tooke Administration, and being sued for debt, did pleade the matter *supra*, and held a good plea; and was found for him before Iust. *Dotheridge ad Oxon. in æstat. 2. Carol. reg.*

36. *Hen.* 6. 7.

But the Lord *Dyer* in the Case of *Greisbrooke*, and *Foxe*, speaking of that Case, saith

 expresly,

expreſly, that the Ordinary might there have rejected the Executors refuſall; for ſaith he, when the Executor had once intermedled; he ſhould not have beene ſuffered to refuſe; ſo as he doth clearely admit that to have beene an Adminiſtration. And elſe where it is held, that if an Executor take goods of the Teſtator, and convert them to his owne uſe; this is an Adminiſtration; yea, if hee doe but take them into his hands, ſay ſome, without converting of them: If the wife take more apparrell of her owne than is neceſſary, this is an Adminiſtration, as the Booke admits; but if by the aſſent, or delivery of the Executor, it is not. More clearely, If one doe either pay debts of the Teſtator, or receive debts, or make acquittances for them, or demand the Teſtators debts as Executor; or give away goods which were the Teſtators, or deliver money of the Teſtators for Fees about proving the Will: all theſe be full and cleare Adminiſtrations as Executor. But ſaith *Fitzherb.* if he onely lay out his owne money for Fees, this is no Adminiſtration, ſo ſaith *Fitzwicke*, if he pay debts with his owne money; and if he doe it about the Funeralls. But ſome difference may be betweene Acts done by one, named Executor, and by a ſtranger, *viz.* to make him an Executor of his owne wrong, whereof wee ſhall ſpeake after, not in this place.

20. Ed. 4. 17. and 21. E. 4. 5.

21. Ed. 4. 5.
21. H. 6. 19. 20.
33. H. 6. 31. 8.

1. Eliz. Dy. 166.
33. Ed. 3. Exec. 91.
3. 4. Ma. Dy. 135
26. H. 8. 7. 8.
20. H. 7. Kelw. 63.

21. Ed. 4. 5.
20. H. 7. 5. a.

place. If one being ſued as Executor, take it upon him, and plead in Barre as an Executor, this is an Adminiſtration. 9. Ed. 4. 12. 13. 33. H. 6. 31.

Of the force and effect of refuſall.

AS to the third Point, *viz.* the force or effect of Refuſall. Firſt, it is cleare, that if there be but one Executor, and he doe refuſe, or being many, if they doe all refuſe, then is the party dead Inteſtate, and Adminiſtration is to be committed with the Will annexed, as is before ſaid; nor can any after meddle as Executors. But in caſe there be divers Executors, *viz.* *A. B* and *C.* and *A.* onely refuſeth, and the Will is proved by the others, there *A.* continueth an Executor, notwithſtanding his refuſall, ſo as he ſtill may releaſe debts of the Teſtator; and debts owing by the Teſtator may be releaſed to him; yea if Sute be to be had, by, or againſt the Executors, it ſhall not be in the name of *B.* and *C.* onely; but *A.* alſo muſt be named as a Plaintiffe, or Defendant, elſe the Action may be overthrowne. For the Will being proved, all the Executors therein named, ſtand and continue Executors; notwithſtanding any of their refuſall, as it was reſolved in the later end of the late Queenes time, according to divers former reſolutions. And therefore this Executor Cooke, lib 5. f. 28. Cont. 18. E. 2. Brc. 847. 22. Ed 3. 19. 15. Ed 3. Exec. 8. 41. Ed 3. fol. 22. 21. Ed 4. fol. 24.

which hath refused, may afterwards Administer at his pleasure, and intermeddle with the goods, as well as the others: yet saith *Brooke* Chiefe Justice, after the death of his Companion, he cannot so doe, but then the Executor of him who proved, is onely to Administer, *Quod non est Lex.* There may be some difference betweene Sutes by Executors, and Sutes against Executors; for when themselves sue, they being privy to the Will, and having the Custody of it, must bring their Action in the name of all the Executors according to the Will; but he that is to bring an Action against them neede not perhaps take notice of more Executors, than those that have proved the Will, or otherwise doe Admiuister: for it is no good plea for themselves in an Action against them, to say there is another Executor, without saying also that he hath Administred, as it seemeth by divers Bookes. Nay one Booke in the time of *Henry* 8. goeth further, *viz.* that if Sute be brought against all, yet one of them not intermedling with the proving of the Will, may pleade that he was never Executor, nor Administred as Executor. By this it should seeme, that Executors refusing (I meane all of them, so as no Will is proved) they in an Action against them, may say, that they were never Executors; but me thinkes they should not so pleade, but shew the

42. Eliz. Co. 9. f. 36 37.

4 & 5. Ph. & Ma. Dy. 1695. contra. 21. Ed. 4. 23. 24.

33. Hen. 6. 38. a. Co. 9. 37. 6. 32. Hen. 6. 25. 27. Hen. 8. 11. p. totam curiam.

the ſpeciall matter, as was done in the time of *Edward* the Fourth.

As for Relation, I will forbeare to ſpeake, till I come to proving, for that *Probate*, and Refuſall ſtand in the ſame ſtate, as touching Relation. 9. Ed. 4. 33. Co. 9. fol. 36.

Of proving Wills.

NOw let us ſee touching the *Probate* of Wills, what is conſiderable; and therein of theſe three or foure parts;

1. *Where, and before whom, and how the proofe muſt be.*
2. *What ſhall be* Bona notabilia, *to intitle to* Probate.
3. *What force or validity, either a right, or erroneous* Probate *hath.*
4. *What relation either Probate or Refuſall hath.*

As touching the firſt Point, *viz.* How, and where, and before whom Wills are to be proved, briefely thus;

The proving is in the Spirituall Court: yet in ſome Manors by Preſcription, Wills are to be proved before the Steward, though no Lands thereby paſſe, as appeares by divers Bookes: and in the Manor of *Maunsfield* is this Preſcription; and in others whereof *Tremaile*, was Steward in King *Richard* the third his time, as he declared, and the like. I may 2. R. 3. Finch. 4. Co. lib. 9. fol. 43.

tell of my owne knowledge, touching the Manors of *Cowley* and *Cavelsham* in the County of *Oxford*, where I have kept the Courts for the Lord *Viscount Wallingford*, and found it in present and frequent use. And it is said by the Judges, in the time of King *Henry* 7. that this proving of Wills in the Court Spirituall, is not ancient but of later time. Yea it is acknowledged by *Lindwood* the Deane of the Arches, that it pertaines not to the Spirituall Court of Common right; nor is so in use in other Kingdomes. The reason why the Law of *England* hath herein given way to the Ordinary, and Court Spirituall, is said by *Walsh* in *Greisbrooke* & *Foxes* Case, to be the pietie and integritie which is presumed to be in those of that Function, having charge of soules. Indeede they are, as it seemes to me, Executors of the New Testament; or last Will and Testament of *Iesus Christ*; wherby great Legacies and Gifts are given to men, & by Pastors to be dispensed & distributed: of which distributers, it is required, as S. *Paul* saith, *That they be found faithfull*. And happy are they who with him can pleade, *Plenè Administravit, viz.* that they have fully Administred, as he did; much depending thereupon, *viz.* Gods honour, the blessing, prosperity, & safety of the Country, the Pietie, Justice, Conscience, Contentation and Salvation of men. As for Wills proved

11. H. 7. 12.

Flet. Com. 279.

1 Cor. 4. 2.

Acts 20. 27.

ved in *London*, and *Oxford*, before the Major, that is onely in reſpect of the Burgages within thoſe places deviſable, but they were to be proved alſo before the Ordinaries, in reſpect of the goods, and there onely where no Lands bequeathed.

The proving then is to be before the Ordinary Generall, particular, or ſpeciall. By Generall, I meane the *Metropolitane* or *Archb ſhop*, before whom it is to be proved; in caſe the Teſtator have goods valuable, called *Bona notabilia* in divers Dioceſſes, whereof he is Superior.

Vide fol. proxim. If Bona Notab. both in Canterb. and Yorke.

Of Bona Notabilia.

WHat ſhall be ſaid to be *Bona Notabilia* is conſiderable, for there-about hath beene much diverſitie of opinion: Some holding, that they muſt be of fortie ſhillings value; ſome five pound, ſome tenne pound; yea ſome, that the value of a penny ſufficeth to draw it to the *Archbiſhop*, from the particular Biſhop. But that difference of opinion I conceive to be now cleared, by a Canon made in the firſt yeare of his Majeſties Raigne, at a Convocation then held, whereby it is eſtabliſhed, that five pound ſhall be the ſumme, or value of *Bona Notabilia*; yet therein is this *Proviſo*, that where by Compoſition

Canon 92, 93.

or

or Cuſtome in any Dioceſſes, *Bona Notabilia* are rated at any greater ſumme; the ſame ſhall continue not altered. It is likewiſe thereby provided, that if any man die in *Itinere*, *viz.* in his journey or travell, the goods which he then hath about him, ſhall not cauſe that Adminiſtration ſhall be committed, or the Will proved before the *Metropolitane*.

Having conſidered of the value: now another Point obſervable, is, what things ſhall be ſaid, to be *Bona Notabilia*. And as to that debts owing to the Teſtator, are *Bona Notabilia*, as well as goods in poſſeſſion; their value being anſwerable; yet I thinke, if the *Penall* ſumme of the Bond be but five pound for payment of a leſſe ſumme, although the Bond be forfeited; yet in the Spirituall Court, where reſpect to Conſcience, ſuppreſſeth the favouring of Executors; this will not be taken to be *Bona Notabilia*, *viz.* of five pound value, although in Law, the whole *penall* ſumme be a dutie. But if the debt be five pound or more, though it be deſperate or due from the King, againſt whom no Sute can be, but only by petition; yet will this ſtand for, & as *Bona Notabilia*, as I take it in the Court Spirituall, though thereabout I can but cõjecture ſince the Rules of our Law determine it not. And this Point touching the Kings being debtor, I finde debated in the late Queenes time, but not reſol-

21. Eliz.

ved

ved, ſo farre as I finde, but there *Popham* at the barre urged, that no debt ſhould be *Bona Notabilia*; and if it ſhould, yet not ſuch, for which no remedy by Sute, as in that Caſe, the Queene being debtor. Yet a further Queſtion Locall, is touching theſe debts, or things in Actiõ, in what place or Dioceſſe, they ſhal be ſaid to be, as *Bona Notab. viz.* whether in the place where the debtors be, or where the Obligation, or other ſpecialties be. And as to this, the Law hath bin taken, that becauſe the perſons of the debtors be moveable, paſſant, and tranſitorie; therfore theſe debts ſhall be ſaid to be, and to make *Bona Notabilia*, where the Bonds, or other Specialties be, and not where the debtors inhabit and dwell: and ſo was it not long ſince conceived by Juſtice *Walmeſly*, and Juſtice *Beaumont* in one *Pretimans* Caſe, no other contradicting it. Herein therefore many are miſtaken, who only in reſpect that the perſons of the debtors do dwell in forraine Dioceſſes, other then the places of the death of the Teſtator, or where his other goods were, doe take Adminiſtration in the prerogative Court, though the Specialties remained, where the party died, or his goods reſidue, were. But in caſe the debts be onely by Contract without Specialtie, then indeede they are to be eſteemed *Bona Notabilia*, there, and in that place, where the debtor is as the ſaid Judges well

Goods conſiderable or conſpicuous.

Hil. 37. Eliz. M. Com. Da. Vide 13. & 14. Eliz. Dy. 305.

ceived the difference. But in case Land be given to Executors, for payment of Debts or Legacies, this shall not be *Bona Notabilia*, as I take it, though it be Assets.

Of the validity, and invalidity of Probates.

AS to the third Point, we will first see of what validity an erronious proofe is, and thereabout we shall finde this difference: admitting that one hath not *Bona Notabilia* in divers Diocesses, so as of right, the proving of the Will, appertaineth not to the *Metropolitane*, and yet the Will is proved before him; this is not meerely voide, but stands in force, till it be reversed by some sentence upon appeale, as was resolved betweene *Veare* and *Ieoffries*, in the late Queenes time. But on the other side, in Case one have *Bona Notabilia* in divers Diocesses, or a Peculiar, and a Diocesse, and yet the Will is proved before the Particular Bishop, within whose Diocesse part of the goods are; this is meerely and utterly voyde, without any reversall. So also of proving in some Peculiar. And in Case one have *Bona Notabilia*, both in the Diocesse of *Canterbury*, and in the Diocesse of *Yorke*; the Will must be proved, either before both *Metropolitanes*, if within each of their jurisdictions,

22. Eliz.

ctions, there be *Bona Notabilia* in divers Dioceſſes; or elſe, as I take it, if there ſo be not in any of the places, then before the particular Biſhops in thoſe ſeverall Dioceſſes, where the goods are. Or if within the one juriſdiction *Metropolitane*, the Teſtator had goods in divers Dioceſſes; and in th'other, but in one Dioceſſe; then in the one place is the Will to be proved before the *Archbiſhop*, and in the other place before the Particular *Biſhop*, as I conceive. And ſo alſo of peculiar juriſdictions. And in ſome places Archdeacons have peculiar or juriſdiction ordinary and power to take *Probates* of Wills and Grant Adminiſtrations. But where any like error or miſproving is in theſe reſpects, it is cauſe of reverſall or of nullity, according to the former difference; ſo alſo, if there be falſhood in the proofe, were it *Cõmuni forma*, that is, without witneſſes, or by examination of witneſſes, yet may it in the Spirituall Court be undone; if either diſproofe can be made, or proofe of revocation of that Will once made, or of the making of a later.

Now, yet admitting the Will true and right, and alſo rightly proved; let us yet ſee the force and ſtrength of the Proofe, or Will ſo proved. It being under the Seale of the Ordinary, cannot be denied, ſaith one Booke, to wit, whether this ſhewed forth, be a Will

proved or not, no, though the proofe be but indorſed on the backe, *viz.* that it is ſo proved, ſaith the Booke: but notwithſtanding the Defendant ſo ſued, may deny that the Plaintiffe is Executor, as not being concluded nor eſtopped by the *Probate*, ſo to ſay. And the reaſon is, becauſe the Scale of the Ordinary is but matter in Fact, and not matter of Record; nor are the ſentences of divorce, and the like, in the Spirituall Court, Judgements, or matters of Record, as hath beene often held.

9. Ed. 4. 47. 22. Ed. 4. 30. 22. H. 6. 32.

Plow. Com. 218. 44. Ed. 3. 32. 19. Aſſ. p. 2.

Of the Relation of Probate *and Refuſall.*

AS for this laſt Point, both the Proving, and the Refuſall ſhall have Relation to the death of the Teſtator, as I take it to divers purpoſes. So as to the Proving, ſaith the Lord *Dyer* expreſly, and confidently in *Greiſbrooke*, and *Foxes* Caſe, and the reſolution alſo of the Caſe proves it. For there Adminiſtration being committed before any Will proved or notified to the Ordinary, as it ſhould ſeeme the Adminiſtrator ſold ſome of the goods to *I. S.* and after the Executors proving the Will, brought an Action of *Detinue*, for thoſe goods againſt *I. S.* who pleaded this Adminiſtration and ſale, and thereupon the Executor demurred, and Judgement was given

Plow. Com. 281. a. 283.

ven for him, as having by the proving of the Will, diſproved the Adminiſtration *ab initio*, but it is true, that judgement was given onely by two Judges; one being abſent; and th'other diſſenting in opinion; yet I thinke it was right, and according to Law; and that Refuſall ſhall have the like relation; elſe could not the Adminiſtration relate to the death of the Inteſtate, as it doth to ſome purpoſes, expreſſed in divers Bookes, *viz.* to have an Action of Treſpaſſe for goods taken before Adminiſtration committed, and to have a rent growing payable in that meane time, &c.

18. H. 4. 22. 2.
9. E. 4. 33. 47.
Not to make good a Releaſe made before Co. lib. 5. 28.
36. H. 6. 8.
2. Ma. Dy. 110.

What Fees to be paide upon Probate, *or for Copyes of Wills, or Inventories.*
Per Stat. 21. Hen. 8. Cap. 5.

1. *where the goods amount not above five pound.* } *only ſixe pence to the Scribe.*
2. *where they be above five pound, but under forty pound.* } *two s. ſixe d. to the* B. B. *twelve d. to the Scribe.*
3. *where above fortypound to be taken, but* } *two s. ſixe d. to the* B. B *two s. 6. d. to the Scribe; or, 1. d. for each ten lines of ten inches long at the Scribes choyce.*

THeſe Summes are to ſatisfie, both for Proving, Regiſtring, Sealing, Writing, Praiſing,

Prayſing, making of Inventories, giving Acquittances, Fines, and all other things concerning the ſame.

Where Lands is given to be ſold, neither the money raiſed, nor the profits thereof ſhall be accounted as any of the Teſtators goods, or chattells, ſaith the Statute.

Note, that the Will is to be brought with waxe thereunto ready to be ſealed, and proofe to be made of the Will, according to common Cuſtome.

For making the Inventory, the Executor is to take, or call to him two Creditors or Legatees of the Teſtator, and doe it in their preſence, or in their abſence or refuſall, two honeſt perſons being the next of his kinne, or in their default, two other honeſt perſons.

The Inventory is to be indented, and one part left with the Ordinary, and the other to remaine with the Executor.

The Executor is to make oath for the truth of it.

For a Copy defired by any either of a Will or Inventory, no more is to be payed than before is allowed for the Regiſtring, with the like election to the Scribe, or Regiſter, as is above-ſaid.

Maſter *Swinborne* ſaith, that an Executor is to ſweare, and, if it ſhould be thought fit, to be bound to make a true account when hee ſhall

shall be thereunto lawfully called by the Ordinary: Of this account, see him, *pag.* 274. and of accounting some Bookes of the Common Law make mention, as 13. of *Edward* the third, *Fitzh. Exec.* 91. Where *Trew* saith, that of a thing in action, no account shall be before the Ordinary; but *Parn.* seemes of a contrary opinion. And else where it is said, that where a debtor is made Executor to the Debtee, he shall yet account before the Ordinary, for this debt: yea as of money in possession, saith one, which others denied.

See also 31. *E.* 3. *cap.* 11. An Administr. shall account as an Executor; *Fitzh. Ex.* 91. and 837. *vez.* 18. *E.* 2. *tit.* Briefe. 48. *E.* 3. 14. 15. Of a duty resting in account, it is said, the Legatee shall have remedy by account, in the Spirit. Court. 81. *Ed.* 4. *f.* 3. *Moyle.* 4. *H.* 7. 15. *per Wood.* 9. *Ed.* 4. 47. *Doct. & Stu.* 78. *b* 21. *Ed* 4. 22. *Plow. Com.* 544. 4. *H.* 7. 15. *Kelw. rep.* 64. *a.*

An Executor by wrong, shall be drawne to account before the Ordinary, saith *Moyle* Justice. But saith S. *German*, he may not force any to account against the Order of the Common Law; not shewing what that is. And *temp. Edw.* the 4. it is said, at least by the Reporter, that after the will proved, the Ordinary hath no more to doe, *quod non credo.*

Also of the oath of an Executor, divers Bookes tell, but not to such purpose as *Swinb.* but truly to performe the Will.

What things shall come unto Executors, and be Assets in their hands, and what not.

THe things which shall come to Executors, are of great multiplicity, and would make a large and confused heape, if tied together in one bundle or lumpe. I will therefore divide and sort them out in parts, after the

the beſt manner I can. Firſt, we will divide the into things poſſeſſary, or actually in the Teſtator, and things in action, or not actually in the Teſtator. Secondly, the poſſeſſary into chattells, reall and perſonall, or (as ſome leſſe properly expreſſe it) moveable, and immoveable.

Of Chattells reall poſſeſſary.

THeſe may be divided into two kinds, *viz.* living, and not living; the living are not many and various. 1. The wardſhip of the body of another, be it by reaſon of a tenure of the preſent owner, or by Aſſignment from the King, or other Lord of whom the tenure was, is a Chattell reall, not perſonall, though it be an intereſt in the perſon of another, but it is in reſpect of a tenure of Land, or other hereditament, and is for yeares *viz.* during the minority, or till marriage had, and ſo is reall. Next, a Villen for yeares as by Grant for a terme from him that had the Inheritance is a Chattell reall. As for an Apprentice, for yeares, it is by Cuſtome, as I take it, that hee goeth, or is derived to Executors: but for reaſon after ſhewed, I thinke this Intereſt be not in the realtie, but in the perſonaltie rather. So of a debtor in Execution for debt, the intereſt

reſt in him or perhaps more properly in his liberty is not as I conceive (for reaſons which after I ſhall expreſſe) a reall, but a perſonall Chattell. The like Law of a Priſoner taken in the Warres. As for Fiſhes in a Pond, Conies in a Warren, Deere in a Parke, Pigeons in a Dove-houſe, where the Teſtator had the Inheritance, or but for life, in the Pond, Warren, Parke, and Dove-houſe, they are not Chattells at all, nor to goe to the Executors, but to the Heire with the Inheritance. If the Teſtator were but a Termer, they are to goe to the Executor, but as acceſſary Chattells, following the ſtate of their principall, *viz.* the Warren, Parke, Dovehouſe, Pond, &c.

The reall Chattells, not living, are either in Houſes or Lands moſt uſually, and that three wayes. Firſt, by Leaſe for yeares. Secondly, by Wardſhip of Lands held by Knights-Service. Thirdly, by extent upon Judgements, Statutes, or Recognizances; Or in things iſſuing out of Houſes or Lands, as Rents, Commons, Eſtovers, or ſuch like. But where an Inheritor reſerves a Rent upon a Leaſe for yeares, this ſhall not goe to the Executor, but to the Heire, with the Reverſion other than Arrerages behinde, at the death of the Teſtator. Alſo Commons, Corodies for yeares, Advowſons, Tithes, Faires, Markets, Profits of Leetes, and ſuch like, which the Teſta-

nor had for yeares, all which may accrue any of these wayes, as the first are Chattell and Reall. Yea, one simple presentation to a Church, upon the next avoydance, is a Reall and not Personall Chattel, before it come to be voyd, and what then it is, we shall after shew. And the title accrued to the Crowne, upon attainder of felony, where the party held not of the King, *viz.* The *Annum diem & Vastum*, that is, power not onely to take the profits for a yeare, but to waste and demolish Houses, and to extirpate and eradicate Trees, and Woodes, is but a Chattell, and therefore though granted to one and his Heires, by the King; yet shall goe to the Executor, and not to the Heire

Temp. E. 1 Assis 234. Esther

Some doubtfull, or lesse cleere Cases, touching Chattels Reall.

FIrst, where we spake of Wardship, it is not to be understood of Wardship, by reason of Soccage tenure, for that goeth not to the Executor, but he shall be next Guardian, who now after the death of the first Guardian, shall be next of Kinne, if the Ward continue under fourteene yeares old, else he is out of Wardship. Secondly, if one have a Lease for three lives to him and his Assignes, this is no Chattell, nor shall goe to the Executor, nor

to

to the Heire, but to him who firſt enters and claimes it as an Occupante, if no aſſignment be in the life of the Leſſee made: Contrarily, of a Leaſe for many yeares, if three, or more, or leſſe, ſo long live; this is a Chattell, and ſhall goe to the Executor. So an extent upon a Statute, yet it is delivered to the party as a Freehold, *viz.* *Vt liberum tenementum*, but that only makes it to be *quaſi liberum tenementi* as to the maintaining of an Aſſiſe, if wrongfully put out. Where one is ſeiſed in the right of his Wife, of Land, or other Hereditament, and is attainted of treaſon or felony, the profit thereof accrued unto the Crowne, is but a Chattell, and though the King grant it to one and his Heires, yet it ſhall goe to his Executors. And if one, having a Leaſe for many yeares, *viz.* a 100. 500. or more or leſſe, and doe deviſe and bequeath the ſame to *A.* and the Heires males of his body, and for want of ſuch iſſue to *B.* and the Heires males of his body, and dyeth, having iſſue a Sonne, the terme ſhall not goe to his Sonne, but to his Executor or Adminiſtrator, for it cannot be made a matter of Inheritance; ſo if *A.* had dyed without iſſue male, the terme ſhould not have gone or remained to *B.* but to the Executor or Adminiſtrator of *A.* as was lately adjudged in the *Exchequer*, betweene Sir *Robert Lewkner*, and Miſtris *Hamond*. So of an advow-

37. Aſſ. 22.

4. E. 3. Aſſ. 166. Br. Chat. 15.

son, or any other hereditament, granted or devised to one and his Heires for a 100. yeares; or if such a termer grant a Rent out of the Land to *A.* and his Heires, or the Heires, or Heires males of his body, yet shall the same goe to the Executor, and not to any Heire; for it being derived out of a Chattell cannot be any Freehold or Inheritance, but it selfe, a meere Chattell. *Partus sequitur ventrem.*

39. E. 3. 37.

So *Manwood*, if granted for life it is but a chattell, *Plow. com.* 524.

Of Chattels Personall.

PErsonall Chattells, or Goods moveable, are also in like manner to be divided into quicke, or dead. The quicke are Cattell of all kindes, as Sheepe, Horses, Kine, Bullockes, Swine, Goates, Geese, Duckes, Poultry, &c. There may be also in living Creatures reasonable an Interest, as in a Chattell personall, as in the person of a man taken in execution for debt. And this I hold to be in nature, not a Reall, but a Personall Chattell (as before was touched) for that debt is the roote of it, and the body is but a pledge or gage, dischargeable instantly upon payment, release, or other discharge of the debt. Like Law of a Prisoner taken in the Warres, for thereof and therein, as in a Chattell, hath the party a legall interest, as appeares by a Writ of Trespasse in the Register, for taking away a Prisoner. *viz. Quare quendam*

Norma, br. 88. *Reg. orig.* f. 102. There is mentioned that the prisoner was to have a 190. l. for his ransome,

quendam Scotum priſonarium ſuum cepit. &c. And note lately, *viz.* In the time of King *Henry* the 8. the King himſelfe, upon the winning of *Bullen* bought divers Priſoners of his Subjects. And by a Statute in the beginning of *Henry* the 6. his time, this Intereſt in a Priſoner is mentioned as valuable, and comming from one King unto another; therefore doubtleſſe ſhall go from Teſtator to Executor by death, and not be infranchiſed or freed thereby. The intereſt which one hath in an Apprentice, I take to be rather Perſonall than Reall, though for yeares, becauſe not ſpringing out of any Reall roote, as Wardſhip, and Villenage doe; but out of a meere contract. As for a Servant whoſe Maſter is dead, doubtleſſe he is legally diſcharged, and is not Servant either to Heire or Executor; but meete and honeſt it is, that one of them continue him in ſervice till a fit time of providing him a new Maſter, and fit for him, not to depart ſuddenly. Now for things perſonall without life; Theſe are evident, *viz.* all Houſeholdſtuffe, Implements, and Vtenſills, Money, Plate, Jewells, Corne, Pulſe, Hay, Wood felled, and ſevered from the ground, Wares, Marchandiſe, Carts, Plowes, Coaches, Saddles, and ſuch like moveable things.

Bra. lib. ca. 395. & lib. Property 38.

1. H. 6. cap. 5.

More doubtfull Cases touching things personall.

10. E. 4. 14. 15. Come of wilde ones. 22. H. 7. Kelw. rep. f. 88. 118. Co. lib. 12. fo. 50. 18. H. 8. 2.

FIrst touching things living: If the Testator had any tame Pigeons, or Deere, or Conies, or Fesants, or Partridges, these all aswell as Chickens shall goe to the Executors; so though not tame, if they were taken and kept alive in any Roome, Cage, or like Receptacle, as Fesants and Partridges often be, so fish in a Trunke, as also young Pigeons, though not tame, being in the Dovehouse, not able to flie out; yet their Dammes the old ones shall goe to the Heire with the Dovehouse. And if the Testator had any reclaimed Hawkes, they also as Chattells Personall shall goe to the Executor, because they are things commonly vendible. And whereas Hounds, Greyhounds, and Spaniells, be not so commonly bought and sold, nor so anciently have beene, yet are they now growne to be a Marchandize, and why not? for although they be for the most part but things of pleasure, that hindereth not but they may be valuable, as well as Instruments of Musicke, both tending to delight and exhilarate the spirits. A cry of Hounds hath to my sense more spirit and vivacity than any other Musicke. Adde hereto that there may be some profit, and advantage gotten by them

10. E. 4. 14. 15. & 18. E. 4. 8. So of young Hawkes in the nest. It is felony to steale these, *Ergo*. they be goods.

So an Hunters horne, a Falkoners lewer.

them, both *quoad adeptionem boni, & ademptionem mali*, the getting of some good food, and the preserving of others, as Lambes, Conies, Fish, Pultry, by killing Foxes, wilde Cats, and others, which destroy them. And wee know that money is recoverable in dammages for taking away such, or a Mastiffe, serving to keepe an house. So of Ferrets to catch Conies, &c. Therefore they are valuable. But it may perhaps be objected that none of these above are Cattell, and therefore not repleviſable, consequently no property in them, for when more then one living Chattell is distrained, the *replevin* is to be by the name of *Averia* signifying Cattell. For answer, not to insist that one may have property in divers things, whereof no *Replevin* lyeth, as Corne or Hay, not in Sackes nor Cartes, money not shut in bagge, nor box, &c. I further say that even the word *Averia* may be applyed to these, for so I find it to Hens and Capons in the Booke of Entries, *viz.* in the writ of *Curia Claudenda*, where the Plaintiffe complaines of the Defendants, not making his *Mounds per quod averia ipsius A. viz. Capones, galina & alia Averia ipsius A.* that is whereby his Cattell, *viz.* Capons and Hennes and other his Cattels came into the Plaintiffes House and Garden to his dammage, &c. And both *Newport*, and *Newdigate* hold that a writ of *replevin* lyeth of such things, though *Brudenell*

Hares, Deere, Pesants, Partridges, wilde Duckes, &c. are good meate.

Fo. 142.

Hen. 8. fol. 3.

nell were of contrary opinion, yet he alſo held an action of Treſpaſſe maintainable for taking of them, and therefore admitted a valuable property in them. Now come we to things without life, and firſt to thoſe abroad in the Fields. Put the caſe that a man dyes in *July* (before Harveſt I meane) ſeiſed for life, or in Fee, or Taile, in his owne right or his Wives, or eſtated for yeares, of Land, in the right of his Wife, being ſowne with Corne or any manner of Graine, the common ſaying is, *Quicquid plantatur ſolo, ſolo cedit*, yet this ſhall goe to the Executor of the Husband, and not to the Wife or Heire, who ſhall have the Land: but Hay growing, *viz.* Graſſe ready to be cut, Apples, Peares, and other fruite upon the Trees ſhall goe to the Wife, as alſo if they had beene upon a mans owne Land of Inheritance, they ſhould goe to the Heire, though the Corne ſhould goe to the Executor. The reaſon of difference is, becauſe this later comes not meerely from the ſoile, without the induſtry and manurance of man as the other doe: and I take Hoppes though not ſowne, if planted, and Saffron, and Hempe, becauſe ſowne to pertaine as Corne to the Executor. All thoſe yet ſhall paſſe to one, to whom the Land is ſold or conveyed, if not excepted, though never ſo neere reaping, felling, or gathering. But what if the Wife had the Leaſe for yeares as Execu-

Roots of Carrots, Parſnips, Land ſold when Corne is ripe

Executor to ſome former Husband or other friend, and the Husband after ſowing dyes, who then ſhall have the Corne? Certainely the Corne ſhall goe to the Executor of the laſt Husband, at leaſt ſo much as is more then the yeares value of the Land, or the making it up by addition of other things; for the value is to be aſſetts for payment of debts and Legacies. Put the caſe againe that the Husband and Wife were joynt-tenants of the Land, and then the very Corne growing ſhall ſurvive to her, together with the Land, and though the Husband ſowed it, yet ſhall it not goe to his Executor. Being in conſideration of things growing on the ground, let us not forget to thinke of Trees ſold by *I. S.* ſeiſed of the Inheritance of the Land to *I. D.* who dyeth before felling, this Intereſt is a Chattell which ſhall goe to the Executor, and not to the Heire of *I. D.* but ſome colour may be that theſe, becauſe fixed to the ſoyle and Freehold, are reall Chattells, as the Intereſt in Land is, and not perſonall: So alſo of Trees Excepted by him who ſelleth the Inheritance of the Land; but in both caſes I conceive this intereſt to be perſonall, and not reall; for that, as it is a propriety of Chattell in the Vendee or Vendor with exception, it ſtands in conſideration ſevered, and abſtracted from the ſoyle, or ground where the Trees grow, though the Trees be

For he was Tenant for life in effect.

The Wife alſo ſhall have convenient apparell 33. *H.* 6. 31.

2. *Eliz. Dy.*

not actually severed by the Axe from their mother Earth. But if the Lessor for yeares or life except the Trees, these continue parcell of the Freehold and Inheritance. And after Corne reaped, and before the Tithe set out, the Inheritor of the Tithe dying, I thinke the Executor, and not the Heire, shall have the Tithe after set out.

6. lib. 11. f. 48.

Of Houses, or things about the House.

Now Let us come home to the Testators house, and see in and about it, some doubts, what pertaines to the Heire, and what to the Executor. Question hath beene both of old and of late, touching Coppers, Leads, Furnaces, Fats for Dyers, or Brewers, Pales, Rayles Glasse in Windowes, Tables *Dormants*, Wainscotes, Doores, Lockes, Keyes and such like, to whom these should goe? whether to the Heire or Executors? And in the latter end of *Henry* the 7. his time, an Executor taking a Furnace which was set in the middle of a house and not fixed to any Wall, the Heire brought an action of trespasse against him for so doing, and it was adjudged for the Heire, *viz.* that this was to goe as part of the Freehold, and Inheritance to the Heire; and long before in *Edward* the third his time, it was debated whether it were waste in a Lessee to remove or take away a Furnace or not, but I finde no opinion delivered by the Judges: But in the late Queenes time, Justice *Walmesly* said that the

42. E. 3. 6.

21. H. 7. f. 26.

42. E. 3. f. 6.

the Lord *Dyers* opinion was, that where the Furnace is not fixed to the Wall, the Leſſee might within his terme take it away. Contrarily, if it were fixed to the Wall, for then it ſtrengtheneth the houſe. And yet notwithſtanding it might be in the one caſe ſo removed by the Leſſee, yet is it not there, as he ſaid, a Chattell perſonall or moveable, ſo as it is attachable; and there the caſe being that a Clothier being a Termer of an houſe had fixed a Copper to the Wall with Loomes and prickes neceſſary for his Occupation, a Judgement being had againſt him, the Sheriffe delivered the Copper in execution as a Chattell, and after the Leſſee tooke it up, and it was taken from him by vertue of the Execution; whereupon he brought an action of Treſpaſſe, and by all the Judges, the action was mainetainable. And whereas it was found by the Jury, that by the Cuſtome of *Kent*, the Leſſee might remove ſuch a Copper; Juſtice *Beaumond*, ſaid that without any Cuſtome a Leſſee might ſo doe at any time during his terme. But it is to be noted in the ſaid caſe, that the Furnace was by it ſelfe delivered as a moveable Chattell, and not as part of the houſe, for that was not medled withall, nor at all delivered in extent (as in the caſe betweene *Miles* and *Prat*, where both houſe and Copper were delivered upon a Statute) the houſe belike being held

H. 37. Eliz. Atkins caſe.

upon ſuch a rackt rent, as that the party did not deſire to have it, for hee might have had the whole being a Chattell, and ſo have uſed the Copper during the terme. And as touching all other fixed things, the Law was taken in the ſaid caſe in *Henry* the 7. his time, to be all one, as in the caſe of the Furnace, *viz.* that they ſhould goe to the Heire, ſave onely that for glaſſe in the Windowes, *Pollard* ſaid it was otherwiſe, *viz.* that that ſhould goe to the Executors, which none there denyed. But ſince, in the late Queenes time it was otherwiſe reſolved touching glaſſe, that it ſhould not goe to the Executors, and the like was there ſaid, touching Wainſcotes, and ſo alſo by the Lord *Ander*, in the ſaid caſe of *Auſtin*. And touching Poſts fixed, for that they be parcell of the Freehold, ſo alſo of Millſtones, Anvills, Doores, Keyes, Windowes, none of theſe be Chattells, but parcell of the Freehold, or thereto pertaining, therefore, not the Executors.

Co. lib. 4. f. 63. 64

Things in Gardens.

Now to come to Gardens alſo: Whereas, I before laid down a difference betwixt things ſowed, or not ariſing from the Earth, without manuring, and ſuch as grow of themſelves; It will thence be concluded that the rootes of Carrets, Parſneps, Turneps, Skerrits, and ſuch like, coming and ariſing from yearely ſowing, muſt goe to the Executor, and not to the Heire;

Heire; the caſe being ſo, that the Gardner and Sower had the Inheritance of the Garden, or Soile, now though in moſt places this can rarely be a queſtion of value, yet about *London*, and ſome great Townes it may, and therefore not unworthy of a line or two, a thought, or two, the rather for that the reaſon of this caſe may give light touching right in other Caſes. And in my opinion theſe, notwithſtanding, there is a ſowing and manurance to generate them, and cauſe their being, ſhall goe to the Heire and not to the Executor: my reaſon is for that the thing of profit is the roote which is hidden in the ground, and I hold it no reaſon, nor agreeable to Law, that the Executor ſhould digge and breake the ſoyle and ground to ſearch for her entrailes; hee is to content himſelfe with that which is above ground, as millions of all kindes, and the like whoſe fruit is above the ground; but as for Artichoks, though the fruit be above the ground, yet I thinke they have no ſuch yearely ſetting, or manurance as ſhould ſever them in intereſt from the ſoyle, therefore they ſhall goe with it to the Heire.

Let us now conſider of things, though not fixed to, yet uſually kept in houſes, *viz.* writings, and evidences, whereabout generally, no doubt can be, but that they follow the intereſt of the Land, ſo as if they touch inheritance, they pertaine to the Heire, if but Termes

Goods, Chattells, or Debts, they pertaine to the Executor, yea ſo doe Statutes, and Bonds in Law (howſoever otherwiſe in equity) though they concerne the aſſurance and enjoying of inheritance purchaſed. What if *A.* morgage the inheritance of Lands to *B.* upon Condition of redemption by payment of 500. pound to *B.* his Heire, or Executor, and *B.* dyeth, the Deedes being delivered into his hands; now the Heire, not the Executor, ſhall have them; for though the money may be paid to the Executor, yet meane time the Land deſcends to the Heire, nor is there any debt to the Executor, for *A.* may chooſe to pay, or not. Put it on the other ſide, that the Land had beene ſold for 500. pound, not paid to *A.* but a Condition that if not paid to him, his Heire, or Executor, by ſuch a day, then to re-enter; and *A.* dyeth, here is a debt to the Executor, and no Land deſcended to the Heire of *A.* yet ſhall the Heire have the Deedes, for that a Condition is deſcended to him. Queſtion hath beene touching Boxes and Cheſts, wherein the Evidences concerning inheritance are; and although the better opinion in our Bookes, doth pitch upon this difference, that where they are ſealed up, they ſhall pertaine to the Heire, otherwiſe, where not ſealed; I cannot conceive that difference to be grounded on good reaſon; but rather thinke

41. *E.* 3. 2. 36. *H.* 6. 26. 18. *E.* 3. 4. 3. *H.* 7. 15.

thinke that Boxes, which have their very creation to be the houſes or habitations of Deeds ſhould, as appurtenant to them, goe to the Heire, whether ſealed or not. On the other ſide Cheſts made for other uſe, *viz.* the keeping of Napery, or Apparell, ſhall not, as I conceive be taken as appurtenant to Evidences, becauſe ſome be in them, for ſo may other things alſo be: Nor as touching them can ſealing be of any effect, but rather locking, and not locking muſt make the difference touching them, if any difference by incloſure.

Qu. If ſole uſe that way make a difference or not.

Of things not actually in the Teſtator, but accruing to the Executors, by or after the Teſtators death.

Theſe be of diverſe ſorts, the firſt and chiefe whereof are things gotten and acquired by Action or Suite. Secondly by Condition or Covenant without Suite. Thirdly, by Remainder.

Of things in Action.

TO ſpeake firſt of the firſt, it is cleare that debts due to the Teſtator, be it by Bond, Statute, or Judgement, or for Arrerages of Rent, are not aſſets to charge the Executor, untill

untill receipt of them, and it is as cleere that the Actions to recover theſe doe pertaine to the Executor, and that the debt and dammages recovered ſhall be aſſerts to charge the Executor. So alſo of Actions of *Detinue*, and of covenant for any thing perſonall or any Chattell Reall, Leaſe, Wardſhip, or the like. But perhaps ſome will doubt of Covenant touching Inheritance, *viz.* the aſſurance of Lands or enjoying thereof, free from this or that incumbrance or the like: Yet even in thoſe caſes, if the Covenant were broken in the Teſtators life time; I thinke clearely the Action is accrued to the Executor, for that his Teſtator was to recover dammages in the Action of Covenant for that breach, and he being intituled to theſe dammages as principall, and not any acceſſary thing in that action, the Law hath caſt that action upon the Executor. And that is the cauſe why, if waſte be committed in the life of the Leſſor by his Leſſee, and then the Leſſor dyeth, his Heire can have no Action for this waſte. *viz.* becauſe he cannot recover the treble dammage, as neither can the Executor have it, for that he cannot recover *locum vaſtatum*, the place waſted, the Inheritance whereof is in the Heire.

That an Executor at the Common Law could not maintaine an Action of treſpaſſe for goods of his Teſtator, taken away in his life time

See Stat. 32. H. 8. cap. 37. Remedy for Rents of Inheritance, or for life.

A Church of the Teſtators Inher. become voyd in his life, comes to the Executor as a thing in action but is not Aſſets, for not vendible.

11. H. 4. 38. 45. E. 3. 3. 21. ass. 59.

time seemes to be implyed by the Statute in the time of King *Edward* the third. Which gives such action: Yet it seemes that a *Replevin* was mainetaineable by the Executor, at lest in some cases for goods taken or distrayned in the Testators life time: But in case the distresse were for Rent, Service, it is said a little after the making of that Statute, that the Lord may not now avow for his Rent, or Service, because his Tenant is dead, but must set forth the matter, and thereupon justifie to excuse himselfe from answering dammages, and the Executor shall by this Action recover the Cattell or Goods, and that by the Common Law, saith the Booke, though the Statute of *Marlebridge* had never beene made, for that the property remained in the Testator. Note it speakes not at all of the said Statute of 4. *Edward* the 3. But *Newton* in the time of King *Henry*. the 6. would have it that the Executor in that case should not have a *Replevin* but an Action of Trespasse grounded upon the said Statute, *viz.* 4. *Ed.* 3. Which me thinkes cannot be by any meanes, by reason of the Statute of *Marlebridge*. *cap.* 3. *Non ideo puniatur dominus*, *&c.* for the Executor, as well as his Testator, is thereby restrayned, as I thinke, from the Action of Trespasse against the Lord. As for that no Avowry can be made upon the Tenant, that is now remedyed by a late Statute:

4. E. 3. c. 7. And the like given to Executors of Executors per. Stat. 25. E. 3. c. 5.

17. E. 3. Fit. 106

cap. 21. meant ut credo.

21. H. 6. 1. but Markham e contra

21. H. 8. cap 19. 4 E. 3.

tute: The other Statute hath beene taken to extend to other things then Goods moveable, for where a Church becomming voyd, a stranger presented thereunto wrongfully, and the Patron dyed, it was resolved in the late Queenes time, that the Executor might by the equity of the said Statute, maintaine a *Quare impedit*. But whether an Action of Trespasse lyeth for an Executor, against him who spoyled the Testators Corne, Grasse, or Wood, growing, hath beene questioned, but no where resolved to my knowledge. I thinke it may lye with some difference: First, for that the Statute of 4. *Edward* the 3. doth not onely speake of Goods carryed away, as limiting the Law to that trespasse soly and particularly, but speakes generally of Trespasse done to Testators; and then brings in that particular of goods, as one Instance. Now there be many cases of instances or ensamples given in acts of Parliament, which yet doe not restraine the remedy or *purven* to that particular, or from extending to other cases, of like nature. Thirdly, the Statute speakes of Trespasses remaining unpunished, which it meant to redresse: But it should still leave many unpunished, if it should have no larger extent, than to that one singular trespasse, of Goods taken away, *viz.* moveables. Againe, the Testator was clearely intituled to a recovery of dammages for this other

The B. of Conent. & L. and Sales case *M.* 32. & 33. *Eliz. in com. ba.* So of Ravishment. *Dl. gard.* 7. *H.* 4. 1. & 7. *H.* 4. 6. *Erect. Bism. & Tild. De clause fracto* meerely it lyeth not. 11. *H.* 4. 3.

This *Poriã. Iust.* did very judiciously urge in *Sales* case *supra.*

other treſpaſſe, which if he had recovered, ſhould have come to his Executor: Yea the things themſelves, all if felled in the Teſtators life, and part though not felled, ſhould have come to the Executor, therefore alſo the dammages recoverable in liew thereof, out of which recovered, the debts and Legacies of the Teſtator are to be ſatisfied. Beſides, this Action of Treſpaſſe is a thing ſevered from the ſtate of the Land, ſo as if the owner thereof had, after this treſpaſſe done, aliened the Land, yet had this Action remained to him, as I take it, clearely. And why not as well as where a Treſpaſſe is done upon the Land of the Leſſee, and then the terme expires, this doubtleſſe doth not take away his Action, nor his Executors. But me thinkes here may be ſome differences probably taken, as firſt betweene a Treſpaſſe in deſtroying or taking away Come growing, and a treſpaſſe in Graſſe, or Wood growing: for the firſt being of that nature, as that, though the Owner had a ſtate of Inheritance in the Land wheron it groweth, & ſhould have dyed before ſeverance and felling, Yet it ſhould have gone to the Executor, and not with the Land to the Heire, therefore doubtleſſe doth the Action for deſtroying or taking away thereof, accrue by the operation of Law to the Executor, in liew of the thing taken or deſtroyed. Otherwiſe, perhaps of Wood or

Graſſe, Which by the Owners death ſhould have gone to the Heire, and not to the Executor. And yet here againe another difference me thinkes may be betwixt Graſſe and Graſſe, *viz.* betwixt that in Paſture and that in Meddow, yearely mowed and turned into Hay, not left to be conſumed by the mouthes of beaſts, as that growing in Paſture. For as the Law diſtinguiſheth betweene theſe Soyles, gives precedency to Meddow, and makes it waſte for a Leſſee to Plough it up, not ſo for Paſture, Yea Tithe is payed of Hay, but not of Graſſe growing in Paſtures, ſo the Meddow Graſſe being in the Owners purpoſe and intention, as a thing ſevered from the ſoyle, ſhould mee thinkes ſo be alſo in the eye, and eſtimation of the Law, and therefore ſtand in a different ſtate, and account from Paſture Graſſe. A third difference may be in the manner of the Treſpaſſe, *viz.* Where the Meddow Graſſe is eaten up with Cattell by a Treſpaſſer, and where by him mowed and carryed away as Hay, for in this latter caſe an Action of *Trover* and *Converſion* for ſo many loades of Hay, is doubtleſſe maintainable by the Executor, though it ſhould be admitted that in the other caſe of conſumption by the mouthes of beaſts without ſeverance, no action ſhould be maintainable by the Executor, which yet I admit not, but thinke the contrary probable. For when

when Meddow ground, which yearely conceiveth (*Sol ſine homine generat herbam*) ſhall be ready to be delivered of her burthen, if a ſtranger putting in an head of Cattell, which ſwallow up, and tread downe this fruit of her wombe, before the Mower with his ſithe, come as a Midwife to helpe her delivery, if then by the haſty death of the Owner, before Action brought, this great Treſpaſſe ſhould be diſpuniſhable, it were contrary, as me thinkes, to the purpoſe of the ſaid Statute, and a great defect in the Law. Yet here perhaps touching this, a fourth difference may be, or ariſe out of the time of the death of the Owner, *viz.* where he dyeth before time of Mowing, and where not; for *Dato* that in the former caſe, becauſe, if ſuch deſtruction or conſumption had not beene; yet the Owner dying before ſeverance, this ſhould not have come to the Executor, but have gone with the ſoyle to the Heire, that therefore the Executor, who is not damnified ſhould recover no dammages. Yet in the other caſe, the Owner living till after Hay time clearely paſſed, *viz.* till the end of *Auguſt*, me thinkes now ſince this fruite of the Meddowes wombe ſhould have beene a Chattell ſevered, had not this Treſpaſſer made unlawfull prevention; Therefore the Executor, towhom the ſame ſhould have come, towards the performance of the Will,

At leaſt me thinkes; Action upon the caſe here and before ſhould be maintaineable.

ſhould have out of the ſaid Statute, an Action, and remedy, reached unto him to recover recompence in dammages for this wrong done in *retardationem Executionis Teſtamenti*. A fifth and laſt difference may perhaps be in the ſtate of the Owner, for *Puſne*, that where the Land is his Freehold, or Copyhold Inheritance, no Action ſhould be given to his Executor, for Wood, or Graſſe taken or deſtroyed in his life time; yet where he is but Tenant for yeares, Guardian, or Tenant by extent, ſo as the very ſtate in the Land was to come, and is come to the Executor (together with *Quicquid plantatur ſolo*) me thinkes the Executor ſhould have, together with the ſtate in the ſoyle, the Action to puniſh the Robber of, or Treſpaſſer upon the ſoyle. Thus having ſcanned and ſifted, to the beſt of my ability, all differences and circumſtances of this point, how farre I am wide, and wherein right, *Aliorum ſit judicium*, or rather, *Altioris eſto judicii*. But this is cleare, that whereſoever Executors doe recover any dammages for treſpaſſe or othet wrong, done to their Teſtator, the money recovered (at leaſt, if Execution be had, or money received) will be Aſſets, in their hands, as well as debts recovered upon Bonds or Bills, or Lands, by them taken in Extent, upon Statutes, Recognizances, or Judgements. Yea without ever having theſe

3. H. 6. 3. *Littleton fo.* 42. a.

So held in *Sales* caſe of dammages in *Quo. imp.* recovered *ante* of the preſentment. Releaſing.

theſe moneyes, Executors may make them aſſets in their hands, viz. by making Releaſes, or Acquittances, or acknowledgement of Satisfaction, for this amounteth to a Receipt, and chargeth the Executors towards the Creditors, with the whole penall ſumme, though happly they receive but part, as the principall, or ſome like proportion. Therefore, there is great caution to be uſed by Executors in this kinde, that unleſſe they be ſure they have Goods ſufficient to pay all Debts, and Legacyes, they make no Releaſe, Acquittance, or Acknowledgement of Satisfaction, for more then they doe receive, be it debt or dammages. And the like caution to be uſed by them, touching ſubmiſſion of debts or dammages, to arbitrement whereby diſcharges of the ſame may grow, for the ſubmiſſion to the Arbitrement, being their voluntary act, although the Arbitrators by their judgement doe diſcharge the debt or dammage in part, or in whole, yet ſhall the Creditors have like remedy thereupon, againſt the Executors, as if they had releaſed, or, which is more, received the ſame. 13. Ed. 3. Fit. 92. Error 11. H. 4. 65. 46. E. 23. Yet upon a verdict in Quaſi imp. the Wife, not the Executor of Huſband did ſeiſe. 9. H. 6. c. 4.

Other Actions there be of diſcharge, which as the Teſtator himſelfe in his life time might have had, ſo may his Executor after his death, viz. Writs of Error, Attaint, Diſceyt, *Audita Querela*, *Identitate nominis*. But this laſt is given

given by Statute. What soever is regained by any of these wayes, as unduely lost by the Testator, shall also be Assets.

Speciall cases pertinent to the Premisses.

1. *Chattells come to Executors from the Testators, yet not Assets.*
2. *Assets which be no Chattells.*
3. *Things in Action, and in the personalty turned into Chattells Reall, & e contra.*

AS to the first, I exemplifie thus, *A.* makes *B.* his Executor, and dyes, *B.* makes *C.* his Executor, and dyes. The Goods left by *A.* to *B.* as Executor, farre exceedes his Debts, and Legacyes, or let us suppose no debts nor Legacyes of *A.* and that *B.* dyeth much in debt, above the Goods hee leaveth, and did make no alteration of the property of the goods of *A.* but meerely left them to *C.* his Executor. Now shall not the Goods which came to *B.* as Executor of *A.* and so from *B.* to *C.* be lyable in Law, to pay the debts of *B.* yet in Conscience me thinkes they should, and that *C.* should not receive them to his owne use, as in Law he may, where *A.* left no debts. But if *A.* making *B.* Executor, did also by his Will give him all his Goods, and he in his life time made election to have them as Legatee;

tee; or by his Will, did so dispose of them, or appoint them to goe, as the goods hee had as Executor, could not be given or disposed: Now by this election they were altered in property from being his as Executor, and so as his owne goods should be liable to his debts. But things in action could not be so given, or disposed, *viz.* Debts, &c. yet if *D.* were indebted to *A.* one hundred pound, and *B.* his Executor, tooke new bond of him, or another for it, giving up the old Bond, now was it become his owne duty, and so shall stand in his Executor.

Another instance of this, thus; If *A.* patron of the Church of *D.* grant to *B.* the next avoydance, the Church becommes voyde, *B.* dies before he presents, his Executor presents, and hath the benefit of preferring his sonne or friend, yet shall this make no Assets in his hands for payment of debts, for that hee could not lawfully take money to present. But if *B.* had dyed before the Church had become voyd; Then because the Executor might lawfully have sold it, the value should be Assets, in his hands, as I conceive, except perhaps the incumbent had died so hastily after *B.* that the Executor had not time convenient to finde out a chapman, and to sell it.

Or if a stranger usurpe in his life, and he dying, his Executor recovers in a *Quæ. imp.* as by *Sale*, was done *infra. Mich.* 32. and 33. *Eliz.* So held in *Sales* Case, *in com. ba.*

Vendere jure potest emerat ipse prius.

If in the other Case, a stranger had presen-

ted, and got his Clarke admitted, and the Executors of *B.* had in a *Quæ. Imp.* recovered dammages, the money ſo recovered, ſhould have beene Aſſets Thus much of the firſt, *viz.* that ſome things of the nature of Chattells, may come to Executors, and yet not be Aſſets.

Touching the ſecond, *viz.* that ſome things may be Aſſets in the hands of Executors, which yet are no chattells; I ſhall give but two Inſtances. Firſt, where a man leaveth a Villen for yeares to his Executors, and the Villen purchaſeth Land in Fee-ſimple, and the Executor entreth into the Land; now hath hee Fee ſimple therein; and this Land is Aſſets for payment of the Teſtators debts. So, if a man by his Will, give Lands in Fee to his Executors to be ſold for performance of his Will. Theſe (before the money thereby raiſed) are Aſſets, both for payment of debts, and of Legacies: But if the Lands had beene given to be ſold onely for payment of debts, they ſhould onely be Aſſets for that purpoſe, and not for payment of Legacies: and ſo, if it were expreſſed to be for payment of Legacies ſingularly, this ſhould not be Aſſets for debts, as I take it. For ſince theſe are not Aſſets of their owne nature, but ſo made by the Will and diſpoſition of the Teſtator; me thinkes they cannot be otherwiſe, nor farther Aſſets than

22. H. 8. Bro. Villenage 46.

If he dye, how ſhall this be Aſſets in the heire.

3. H. 6. 3. and ſo 2. Hen. 4. 21.

If by Feoffment per Markam, cap. Inſt. contr. Rickhill.

See 9. El. Dy. 264

than as the Teſtator hath willed, and diſpoſed; but though Lands thus given were Aſſets before the *Stat.* 21. *Hen.* 8. *cap.* 5. Yet how can it be ſo, ſince for the very words of the Statute be that if one will by his Teſtament or laſt Will, any Lands, &c. to be ſold, neither the money thereof comming, nor the profits taken, ſhall be accounted as any of the goods or chattells of the Teſtator, which I conceive to be all one, as to ſay, that they ſhould not be Aſſets; for when an Executor denieth himſelfe to have Aſſets, the forme of his plea is, *Quod nulla habet, bona nec Catalla*, &c. Yet, ſince that Satute, *viz.* in the late Queenes time, the Law was twice admitted, or conceived ſtill to be according to the third of *Hen.* 6. *viz.* that the Land deviſed to be ſold, or the money thereof comming ſhould be Aſſets. Indeede, in neither of thoſe Bookes, is there any mention of the clauſe in the ſaid Statute; and it is poſſible that it might be forgotten, as in other Caſes ſometime hath happened. But caſting about how to reconcile thoſe Bookes, with the ſaid Statute, and not to ſuppoſe the ſame forgotten at both times, both at the Barre, and Bench (though being but a ſhort clauſe in the middle of a large Statute to other purpoſe, it might well ſo have beene) at the laſt, though not haſtily I grew to conceive, that the ſaid clauſe being

9. *H.D.* 264.
14. *H.D.* 311

in an Act which limitteth the Fees of Ordinaries, and their Scribes, according to the value of the goods of the deceased, and then bringeth in this clause, that the Lands willed to be sold, shall not be accounted as any of the goods, &c. The Parliament meant thereby onely to exclude them to this purpose, that they should not be accounted as part of the goods in the valuation, according to which the said Fees were to be rated; and though the words be generall, that they shall not be accounted as any of the goods, &c. yet is it the more probable, that the Parliament meant no further then as aforesaid, because that clause after the Fees limitted in answerableneſſe to the values, is brought in by a *Proviſo*, *viz.* provided alwayes, that if the deceased Willed any Lands to be sold, the money nor profits shall nor, &c. And thus perhaps it was understood and construed in the said late Queenes time, though no mention be of any remembrance of that clause or provision in either of those Cases reported by the Lord *Dyer*.

As for the third, *viz.* the changing of things out of the personalty, into the realtie, and *e contra*, I shew it thus: If a debt were due to the Executor, as Executor by Statute, Recognisance, or judgement, and he sue Execution, and have Land of the debtors in extent

tent: now is the perſonall duty turned into a chattel reall. On the other ſide, if ſuch an eſtate by extent, or a Leaſe for yeares mortgaged come to an Executor, and the debtor, or mortgager payeth the money due; now are theſe reall chattells turned into Aſſets perſonall.

Another ſpeciall Caſe of Equity oppoſing Law.

IF *A.* be bound to *B.* by Bond, Statute, or Recognizance for aſſurance of Land, *B.* dieth, & the Land deſcends to his heire; or be it that *B.* ſold the Land to *C.* and aſſigned to him the Bond, Statute, &c. yet muſt the Sute, or taking out of Execution, be in the name of the Executor of *B.* and neither of the heire, nor Aſſignee. And that which is recovered, or gotten in extent, will be Aſſets in Law to charge the Executor, as I take it, yet in equity it pertaines to the Heire or Aſſignee *Quære* If the Executor meddle not, but onely ſuffer his name to be uſed.

Of things come to Executors by Condition.

FIrſt, we will conſider of Conditions bringing backe to Executors goods, or chattells granted away by their Teſtators. Touching which, there is no doubt, but if the Condition

be any other than for payment of money, or other things valuable by the Teſtator, or his Executor, the chattell returning to the Executors is Aſſets in his hands: as put the Caſe a Leaſe for yeares, Horſes, Sheepe, Plate, or other Chattell, were granted by the Teſtator to *A.* upon condition, that if *A.* did not pay ſuch a ſumme of money, or doe ſuch other Act as the Teſtator appointeth, and this condition is not performed after the Teſtators death, now is the chattell come backe to the Executor, and is Aſſets. But the queſtion hath beene (and perhaps may be) where the condition is, that the Teſtator or his Executors, ſhall pay the money to make voyde the Grantee, and accordingly, the Executor after the Teſtators death payeth the ſumme out of his owne purſe, not having any money of the Teſtators in his hands: in this Caſe comming in queſtion, *tempore, Hen.* 7. It was reſolved at the laſt, that this redeemed chattell ſhould not be Aſſets, but be to the Executor as his owne proper goods, though at the firſt, three Judges were of contrary opinion, *viz.* that the goods redeemed ſhould be in the Executor, as goods of the Teſtator. And truely I muſt confeſſe, that I cannot yet finde good ſatisfaction in that *Bookes* reſolution, except wee ſhall take the Caſe there to be ſuch as that which is put and reported by the Lord *Dyer*;

Note Diff.

21. *Hen.* 7.

Dyer, tempore Hen. 8. *viz.* that the money payd for redemption, was as much as the full value of the goods, pledged, or mortgaged, or elſe ſhall admit the Caſe to be, that this redemption was not by payment at the day conditioned. As to the firſt, it were rare, that any ſhould lend money upon a mortgage, where the thing mortgaged, is not of better value than the money lent: rare alſo, that an Executor ſhould take care to redeeme with his owne money, that which ſhould yeeld no benefit or advantage to him, or his Teſtator. Let us therefore ſcanne and examine the Point, ſince the ſame may come frequently in uſe; and this we may the more decently doe, becauſe the Lord *Dyer* in the Margent of the Caſe by him reported, as afore ſaid, ſaith expreſly, that the ſaid other *temp. Hen.* 7. was not at all adjudged, himſelfe having viewed the Roll, which he there ſets downe, and the names of the parties. Wee will therefore put the Caſe thus. *A.* poſſeſſed of a Leaſe for ſixtie yeares, of one hundred pound Land, mortgageth it for five hundred pound; or be it that the mortgage or pledge be of a Jewell, or peece of Plate for halfe the value, and that before the day limitted for payment, and redemption *A.* having made *B.* his Executor dieth, and *B.* at the time and place maketh payment, as was conditioned. Now the

queſtion

queſtion is, whether this Leaſe, Plate, or Jewell, being worth much more than the ſumme for which it was mortgaged, ſhall be in him wholly in his owne right, and to his own uſe or partly, if not wholly as Executor to *A.* ſo as to be ſubject to the payment of debts and Legacies. Here it muſt be cleerely admitted, that *B.* was inabled to this redemption onely, and meerely by the Condition annexed to the mortgage, or pledging. It muſt alſo be admitted, that this Condition, and the power or intereſt to take benefit thereof to him; came, and was derived onely as Executor of *A.* This being premiſed, it muſt needs follow, as to me it ſeemes, that the Condition working, and having his operation in the redemption to deſtroy the Grant, mortgage, or pledging, it muſt needs make theſe againe the Teſtators goods, *in ſtatu quod prius*, and ſo to be in *B.* as Executor; ſince in that right onely, he was intituled to take benefit of the Condition. For what is it which hindred before this, from being the Teſtators goods; nothing certainely, but onely the force and ſtrength of the mortgage or pledge: Now by the redemption, that is become voyd, & hath it loſts its force; therfore the property of theſe things muſt needs now be; as if no ſuch mortgage or pledge had beene; or as if it had at the firſt beene voyde, and of no force:

Thus

Thus muſt the Condition worke for him, who made it, *viz.* *A.* the Teſtator, and thoſe of the contrary opinion in the time of King *Hen.* 7. doe yet ſay, That by this redemption, the Teſtator is ſo much in debted to the Executor, as he diſburſed for the redemption; which could ſtand with no reaſon, unleſſe by it the property and intereſt ſhould be reduced to the Teſtators behoofe. That thus it is, is alſo proved; as to me it ſeemes by the Caſe of mortgage of Inheritance, upon which the heire making payment, according to the condition, is not now in as a new purchaſor, but as heire, ſo as he ſhall have his age, and be in Ward, even for this Land: Yea, it ſhall be Aſſets in his hands for ſatisfaction of his Fathers, or other Anceſtors debts, which in ſome reſpect is a harder Caſe than that of the Executor; for he hath meanes to ſatisfie himſelfe of the money diſburſed, either out of the thing redeemed, or other goods of his Teſtator, but the heire hath no ſuch meanes. Yet it will be asked, how the Executor can be free from miſchiefe, for if this thing redeemed be intire, as the Cup or the Leaſe, the whole will be taken in execution for the Teſtators debt. To admit this, yet here is one cleare way of remedy, *viz.* the Executor may before ſuch Execution, ſell the thing, and ſo pay himſelfe, and retaine the ſurp'u-

ſage to the Teſtators uſe, and the like of this is frequent in uſe, *viz.* for Executors to pay of the Teſtators debt, with their owne money, and to make themſelves ſatisfaction out of the Teſtators goods. Beſides, it not impoſſible, that this redeemed thing ſhould be thus in intereſt parted, that anſwerably and proportionably to the ſumme disburſed for redemption, with reference to the value of the thing redeemed, a moyetie or third part, or three parts therof ſhould be to the Executor in his owne right, as his owne proper goods, and the reſt in him as Executor. As *poſito*, that *A.* and *B.* were Tenants in Common of ſuch an entire Chattell; *A.* maketh *B.* his Executor and dieth. Now hath *B.* one moyety as Executor, and another as his owne proper, and upon a Judgement againſt him as Executor, that moyety onely which hee hath as Executor, muſt be taken in execution; and here may be remembred how in execution of a Judgement, or levying of an Amerciament out of an intire Chattell of more value than the ſumme to be levyed, the whole is to be ſold, and the ſurpluſage above the debt or Amerciament is to be delivered backe to the owner. For in all this debate, we muſt preſume the thing redeemed by the Executor, to be of better value than the ſumme payd, elſe wee may eaſily admit

admit the whole to the Executor. Againe, the Leaſe for yeares, is not ſo intire a thing; I meane the Land let, but that thereof partition may be made; yea inforced by Action betweene joynt-tenants, and Tenants in Common: But here will be objected, the Caſe of redemption by the daughter and heire; who though ſhe have a brother borne after; ſo as now ſhe is no longer heire, yet ſhe ſhall, as the Booke ſaith, retaine the Land redeemed from the heire as a *Perquiſite* or Purchaſe. As for this (which I will not oppoſe) the Law ſo frameth to the favour of the daughter, becauſe of great miſchiefe to her, if being ſtripped of the reſt of the Inheritance by the birth of a brother, ſhe ſhould alſo loſe that which her money had redeemed, without having any remedy to have her money againe, or any recompence for it; but in the other Caſe, there is no ſuch miſchiefe for that the Executor may pay himſelfe as hath beene ſhewed.

Now on the other ſide, if the Caſe ſhall be underſtood, that the redemption was by payment after the day, then will I eaſily admit that the property or intereſt, is in the Executor to his owne uſe; or that the Condition, now having no power to reduce it backe, or to operate any thing: It is rather a re-emption, than a redemption, ſince it was at the Will of

the Mortgagee, to diſpoſe it at his pleaſure, and any ſtranger, as well as the Executor might thus have redeemed, *viz.* repurchaſed it, therefore onely Equity and not Law in that Caſe can make any part of the value Aſſets in his hands: And ſo alſo I thinke if wee ſhould admit in the other Caſe of payment, at the day that the property of the chattell is to the Executor as his owne, and not his Teſtators goods, no part of ſurpluſage of value, can in Law be Aſſets, howſoever in Equitie.

Laſtly, if the Executor redeeme by payment at the day with the Teſtators owne money or goods, none will doubt, but that the thing redeemed is in him as Executor, and the money by him payd for redemption is well Adminiſtred, the goods redeemed being of better value. But this way it makes no difference, whether the whole value of the goods redeemed, ſhall be held Aſſets; and the money payd for redemption ſtand drowned therein, or that that ſumme be ſtill adjudged in the hands of the Executor, as Aſſets, and onely the ſurpluſage of the thing redeemed over and above the ſumme payd for redemption.

Things accrued by Covenant or Assumption.

IF *A.* Covenant with *B.* to make him a Leaſe of ſuch or ſuch Land, by ſuch a day; and *B.* dieth before the day, and before any Leaſe made; now muſt *A.* make the Leaſe to the Executor of *B.* and the Leaſe ſo made to him, ſhall be in him as Executor, and conſequently as Aſſets. This is proved by the Judgement, in the Caſe betweene *Chapman* and *Dalton* in the late Queenes time. Yet I confeſſe, that it is not expreſſed in the reſo'ution of this Caſe, that this Leaſe ſhould be Aſſets, but that the Executors ſhould have the Terme as Executors, which implyeth as much in my underſtanding; and the declaration, whereupon the Defendant demurreth, ſets forth the breach of that Covenant to be in *retardatione executionis teſtament.* ſo as the dammages thereupon recovered, *viz.* 300 and 30. pound were Aſſets, and conſequently alſo, ſhould the terme have beene in lew and recompence whereof theſe dammages were given. The like Law, if *A.* aſſume upon good conſideration to deliver in to *B.* by ſuch a day twenty quarters of Mault, or ſo many loades of Coales or Wood, or any other Wares or Marchandiſe; and this is not performed in the

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life of *B.* but after to his Executor, it shall be to him as Executor, and shall be Assets in his hands, as well as the money recovered in dammages for not performing should have bene.

Of things accrued by remainder, or increase.

IF a Lease be made to one for life, the remainder to his Executors for yeares, and he dieth, this will be Assets in the hands of his Executors, though it were never in the Testator, as was in the later end of the late Queenes time, resolved by three Justices, the Lord *Anderson* onely being of a contrary opinion; and there it was said, that *Cranmers* Case, wherein the contrary in effect was resolved, was of little authority; for that there were first two Judges against two, till after, *Mounson* changed his opinion, upon a conceit, that there the estate was by way of use, which could make no difference; like law where a Lease for yeares is by Will bequeathed to *A.* for life, and after to *B.* who dieth before *A.* Although *B.* never had this terme in him, so as that he could grant or dispose it, yet shall it rest in his Executor, as his goods and be Assets. As for a remainder for yeares, so in the Testator, that hee might grant or dispose

diſpoſe it at his pleaſure, no doubt can be thereof, though the ſame fell not in poſſeſſion to the Teſtator in his life time, yet no ſcruple nor doubt can be, but that this is Aſſets to the Executor, even whilſt it continues a remainder, and before it falleth into poſſeſſion, becauſe it is preſently valuable and vendible. Nor much of other nature, to theſe are the Caſes, where the Executor Marchandizing with the goods of his Teſtator, maketh gaine thereof. So if the Sheepe, or other Cattell of the Teſtator doe breed, *viz.* beare Lambs, Calves, Colts, &c. after the Teſtators death, even theſe which were never in the Teſtator ſhall yet be Aſſets, and ſo the Wooll growing upon the Sheepe after the Teſtators death. But there is one Caſe worth the conſideration and worthy of ſome doubt, as I thinke, and that is this. One leaveth to his Executor a Leaſe for yeares of Land, worth twenty pound by yeare, and the Executor keeping this in his owne hands, one yeare after the Teſtators death, doth make thereof thirty pound in cleare gaine above all charges, now whether, as to a Creditor, this whole thirty pound ſhall be Aſſets, or onely twenty pound, and the Caſe ſimply thus put, ſhall be underſtood of an occupying, and manuring without any ſtocke of the Teſtators; and then if the Executor did ſtocke it with his owne Sheepe, or other Cattell, as he muſt

11. H. 6. 35. per Babington.

have

have borne the losse by rot or death; so is it reason, that if the manurants prove gainefull, he reape the fruits thereof in recompence of his adventure, and of his industry, skill, and good husbandry. But if the Testators stocke of Sheepe and Cattell were (as of necessitie, or for the better advantage of the Testators estate) continued upon the Lease Land, then is it reason, that the gaine or losse whether soever of them God sendeth, doe redound to the Testators estate. Like Law, as I thinke, if an Executor finding, that he cannot instantly, after the Testators death, let the Lease Land neare the value, shall therefore buy seede-Corne, and hire the plowing, &c. But it may be said, that the Lease hath one entire valuation at the first, upon the appraisement. To this I answer, first, that the value upon the appraisement is not binding, nor much respected at the Common Law, if it be too high, it shall not prejudice the Executor; if too low, shall not advantage him; but the very value found by Jury, when it comes in question, whether the Executor have fully administred, or have Assets or not, is that which is binding. Next I say, that if a long Lease come to Executors, of Land worth an hundred pound by yeare, and no sale is made thereof by the space of a yeare or more, now the terme continuing of the like value, as at first, it is no reason but this

this hundred pound raiſed the firſt yeare, ſhould goe towards the payment of debts and Legacies rather then any of them ſhould be unpaid. This thing, I meane the knowledge of them are uſefull two wayes, *viz.* Firſt to give light to Executors, to diſcerne what unto them of right pertaines: Next to ſhew unto Creditors and Legatees, what and how farre things ſhall be Aſſets, that is to ſay, goods to enable, charge, and binde Executors to pay debts and Legacies. For whatſoever any of theſe wayes commeth to the Executors from their Teſtator, or is recovered by any of theſe Actions, ſhall be in their hands Aſſetts, the Coſt and charges of recovering deducted.

CHAP. VII.

What manner of Intereſt an Executor hath in his Teſtators Goods and Chattels, and how different from the common Intereſt they or others have in their owne proper goods.

THe Intereſt which an Executor hath as Executor in the Goods of his Teſtator is much different from the abſolute, proper, and ordinary Intereſt, which every one hath in his owne proper Goods, as may well appeare in and by theſe points, 1. Although if a ſtranger take away theſe Goods, the Action of Treſpaſſe for the Executor, is of generall forme, *Quare bona ſua cepit*, calling them his Goods, whereas a man Outlawed in Debt, &c. or convict or attainted of felony or treaſon, forfeiteth all his owne Goods, yet theſe which he hath as Executor, ſhall not be forfeited. If a Villen be made Executor, his Lord cannot take theſe goods, though he may take all the Villens owne Goods: and for taking ſuch Goods, or for a debt due to the Teſtator, a Villen may ſue his Lord. Nay, if the Execu-

24. E. 3. f. 35.

32. H. 6. 34.

Litl. tit. villenage. 41. 42.

Executor grant all his Goods, ſome good opinion hath beene, that theſe which he hath as Executor ſhould not paſſe, yea the Lord *Dyer* ſo held in the late Queenes time, with this difference, *viz.* Where the Grantor is named Executor in the Grantee, there the Goods which he hath as Executor ſhould paſſe, but otherwiſe if he be not named Executor in the Grantee, and that this opinion is probable, will further appeare by that which followeth.

10. *E.4.fo.1.* Yet 39 *H.6.f.15* A releaſe of all actions, by an Executor, extincts actions as Executor.

But *Frowicke* is againſt it in 20. *H.7.Fol.64.*

Secondly, the Executor cannot by Will give or bequeath the Goods he hath as Executor, and if he dye inteſtate, and Adminiſtration of all his Goods is committed to *I.D.* yet hath he nothing to doe with the Goods which the Inteſtate had, as Executor to his Teſtator: Thus all his Goods, reacheth not to his Goods as Executor.

Thirdly, whereas a mans Goods ſtand liable to the payment of his debts, both in his life time and after. The goods which a man hath as Executor, are not to be taken in execution for his owne debts either upon a Recognizance Statute, or Judgement had againſt him. And if ſuch a one dye indebted, leaving to his Executor much Goods, which he had as Executor; theſe are not Aſſets in his hands, lyable to the payment of his debts, but onely for the payment of the firſt Teſtators debts or Legacies.

See theſe reſolved in *Plow. com. 525. inter Bromley & Grantham. T. 20. Eliz.*

cies. Therefore a *Quo min.* brought by an Executor, ſhewing that he was not able to pay the Kings debt, becauſe the Defendant detained from him an 100. pound, which he owed him as Executor to *I.S.* was overthrowne, for that it could not be intended, ſaith the Booke, that the Kings debt could be ſatisfyed with that which the Plaintiffe ſhould recover, and receive as Executor. Whereas a Woman being poſſeſſed of any Chattells perſonall, *viz.* moveable Goods, all be deveſted out of her into her Husband by her marriage, ſo as if he dye, and ſhe overlive, they be not hers againe, but her Husbands Executors, or Adminiſtrators, and if ſhe dye, all be the Husbands, without being Executor to his Wife. It is not ſo of the Goods which ſhee hath as Executor, theſe ſtill remaine in and to her, if her Husband dye, and if ſhe her ſelfe dye, for that ſhe hath them as it were in another right, *viz.* as ſhe repreſents the perſon of her Teſtator, her Husband ſhall not have them, if he be not his Wives Executor, and ſo Executor to her Teſtator.

This may be in his name onely out of whoſe poſſeſſion the goods were taken.

Laſtly, whereas the Writ of Treſpaſſe ſeemes to make no difference betweene ones owne Goods, and thoſe he hath as Executor, that being a poſſeſſory Action or ſuite grounded upon the poſſeſſion; yet come to an Action of debt, which more taſtes and participates

of

of the right, and there are they differenced: for where for my owne debt, when I ſue, the Writ ſaith *Debet & detinet. viz.* that the Defendant owes me, and detaines from me that ſumme. Yet when I ſue as Executor, the Writ ſaith not, *debet*, he doth owe me, but *detinet* onely, he detaines from me, as admitting that he is not the Debtor to me, though he ſhould pay me; and ſo where I am ſued as Executor, the Writ makes me not a Debtor, but a detainer; Otherwiſe, where in my owne right, I owe and am ſued for a debt. Accordingly, where Judgement in an Action of debt is given againſt one as Executor, it is not generally that the Plaintiffe ſhall recover againſt him, but he ſhall recover of the Goods of the Teſtator, and therefore upon this judgement no *Capias* lyeth againſt him, to inforce him to pay by Arreſt of his body, becauſe he is not properly debtor, but if after it be returned that he hath waſted the Teſtators Goods, out of which the ſaid debt ſhall be ſatisfyed; Then he having made himſelfe a Debtor, a *Capias ad ſatisfaciendum*, ſhalbe awarded, againſt him, and then he ſhall be taken in Execution. So alſo in ſome caſes of falſe plea pleaded, for where the Judgement is *de bonis propriis*, the Plaintiffe may have a *Capias ad ſatisfaciendum*, and that Judgement is in diverſe caſes for the dammages, although not in many for the principall. *Co. lib. 5. fo. 32.* *34. H. 6. 43.*

cipall. As for the *Capias* before Judgement, in the meane *proces* against an Executor, that is, because of his Contumacy in not appearing upon the former *proces*.

The reason of this different interest betweene an Executor and another, or betweene the same mans having goods as Executor, and others in his owne right; as also of the different manner of ones being indebted as Executor, and otherwise in his owne right, is well expressed by the Lord *Cooke*, in *Pinchons* case, *viz.* First, that the goods which one hath as Executor, he hath not in his owne right, but in *auter droit*, that is, in the right of another, meaning his Testator. Secondly, that Executors are but the Ministers, and Dispensors, or Distributors of their Testators Goods.

Co. lib. 9. 88. b.

See this also Plow. com. 520. a.

Of alteration of property in the Executors hands, so as some goods become his owne, which he had as Executor.

TO this head or Chapter, treating of the difference betweene the Interest in Goods, as Executor, and others had meerely in ones owne right, and to his owne use, it is not impertinent, to consider how that which one hath at the first as Executor, may be changed in property, and become the Executors owne to his owne use, as other his goods, which he had

had not as Executor. Here let us first consider of ready money left by the Testator: for since pieces of money, *viz.* shillings, groates, pieces and halfe pieces of gold, cannot bee knowne one from the other, it must needes follow that these comming to an Executor from the Testator must in some sort be altered in property, so as though the Executor shall be said to have so much in money or value, yet can it not be discerned which money in his house was his Testators, and which his owne. Consequently the Sheriffe upon the *fieri facias*, for a Creditor, who hath recovered against the Executor to pay debt owing by the Testator, cannot hold.

CHAP.

CHAP. VIII.

Of some cases and questions betweene the Executor and the Heire.

THE Executor may in convenient time after the Testators death, enter into the house descended to the Heire, for the removing and taking away of the Goods, so as the doore be open; or at least the key be in the doore: and this I understand of the doore of each roome: for although the doore of entrance into Hall and Parlor be open, the Executor cannot by that justifie the breaking open of the doore of any Chamber to take goods there, but onely may take those in the roomes which be open; and this is proved, as to me it seemes by the case of the cheſt with evidences, which, saith the Booke, the Executor may take and put out the Deedes, delivering them to the Heire, *viz.* the cheſt being unlocked, as I understand it. Now a Chamber or other roome within a house, locked is an encloſure of better respect then a cheſt. But if the goods be not removed within convenient time, the heire may distraine them as *dammage fesante*.

21. *Hen.* 6. 30. If other goods taken among them he is excused 21. *H.* 7. 25 *Vide lib. Intr.* 640 It is so pleaded.

43. *E.* 3. 24. *Bra.* 145. Makes a *quæ.* if it be locked.

Plow. com. 280.

Where

Where the Teſtator recovered Land and dammages, or a Deed and dammages, he dying before execution, the Heire ſhall have execution for the Land or Deede, and the Executor for the dammages, but *temp. Edward* the 4. it is ſaid that untill the Heire ſue a *Scir. fac.* the Executor cannot ſue execution for the dammages. 43 Ed 3. 2. 10. Ed. 4 5. c. Of the Deed execution firſt.

If a Creditor be made Executor by his Debtor, and pay himſelfe part out of the Goods, he cannot ſue the Heire for the reſt, becauſe the debt cannot be apportioned, but otherwiſe, he may, ſaith the Book: yet *Quæ.* if he doe take upon him the Executorſhip, and have goods ſufficient to pay all. 12. H. 4.

If a debt be recovered againſt one who dyeth before execution ſued, leaving goods ſufficient to ſatisfie; now ſhall not the Land deſcended to the Heire, be charged therewith, nor by like reaſon, any land conveyed after Judgement. 7. Hen. 4. f. 31. See *Bro. Exe.* 134

See a good difference where land is conveyed, upon condition of payment to the Vendor his Heires or aſſignes, and he dyeth before the time, and where it is to be paid to the Vendee his Heires or Aſſignes, and he dyeth, in the firſt caſe, payment ſhall be to the Executors, but not in the other. 10. l. 3. f. 90. 91. To like purpoſe ſee more, *Litl. ſ.* 77. *b.* 2. *Eliz. Dy.* 281. *Plow.* 191.

What things pertaine to the Heire, and what to the Executor is before ſhewed. As for 21. Hen. 7. 4.

Fromickes opinion, that where goods be mortgaged upon condition, that if the Heire or Executor pay, &c. here if the Heire make payment, he should have the Goods: I see not how that can be.

A Directory for the following Chapter.

A. *All as but one represent the Testators person, and must joyne and be joyned in suite,* &c e contra.

B. *Where one alone must answer saine; and how.*

C. *when they differ in Plea, the best shall be taken, but one may confesse alone.*

D. *One aswell as all, both, may give assent or release the whole.*

E. *One cannot give nor release to another, nor divide*

F. *The possession of one is the possession of all, to what purpose.*

G. *If the survivor dye Intestate, the Testator is intestate, though some other Exec. left an Executor.*

H. *Included in the person of the Testator, and represents it. Is his Assignee; all one,* &c e contra.

I. *what change by death of the Testator, touching proceeding in suite.*

K. *Proceedings or in Execution, where without* Scire fac.

M. *Whether the Executor stand in his owne quality or his Testators.*

N. *Where one alone may sue.*

O. *In*

O. *In ſuite for them ſuch as will not joyne ſhall be ſevered, and th'other may ſue and proſecute alone:* conſequents inde.

P. *Death of one Executor, Plaintiffe or Defendant; where abates Writ.*

CHAP. IX.

How Executors ſtand betweene themſelves, and in repreſentation of, or relation to the Teſtator, As his Aſſignee or Deputy, or as the ſame perſon with him, and where and to what purpoſe, as other perſons.

FIrſt, all of them doe repreſent the perſon of the Teſtator, and therefore muſt they all joyne in ſuite againſt others, and in ſuite by others they muſt be all made defendants, or at leaſt ſo many of them as do Adminiſter: for though the Executors themſelves muſt take notice by the Will, how many Executors be, and muſt frame their ſuite accordingly; Creditors and ſtrangers neede not take notice of any more then doe Adminiſter, and Execute the Office of Executors. For this reaſon, as I take it, in

A Are as one perſon; therefore cannot plead ſeverall pleas in abatement. 38. H.6. 17. 9 H.6. f. 44. 38. E. 3. 9 Bro. Ex. 13. Bro. Ex. 20, 21. Therefore one Executor ſued, if he plead that there is another Executor not ſued, muſt plead that he did adminiſter, 9. H.6. 44. Bro. 11. 33. H.6. 38. B. 9. 20.

the time of King *Edward* the 3. where two Executors were of a terme, and the reversion was granted by Fine, mentioning but one termor, and thereupon a *Quid juris clamat*, accordingly brought against that one Executor, this was held good enough, though the other Executor was not named in the Suite; belike, because that one (who indeed was the Testators Wife) did onely occupy the Land, and take the profits thereof; for else since all the Executors doe represent the Testators person, all must have beene named. Therefore did the Judges resolve in the time of *Henry.* the 4. that where a Lessee for yeares made two Executors, and one of them was distrayned by the Lord for Rent, who avowed upon the Lessor, that Executor should have aide of his fellow Executor, to the end that both might have aide of the Lessor, which one alone could not. And upon this reason, *viz.* that the Executors represent the person of their Testator, as one person (for so speakes the Parliament) It was enacted in time of *Edward* the 3. that the Executors, though never so many, shall have but one essoyne, neither before appearance nor after, because their Testator whose person they represent, could have had no more.

§ 2. E. 3. qu'd jur. clam. 5.

13. H. 4. fol. 186

A

9. Ed 3. cap. 3.

A

It is further also enacted by the said Statute, that where two or three Executors or more be, they

they being ſued in an action of debt, though all doe not appeare; yet ſuch one of them or more as doe, or doth appeare at the *Graunde diſtreſſe*, ſhall anſwer alone without his companions. And this Statute hath beene taken by equity in three reſpects.

B' But not if he appeare at the ſummons 1. E.4. 1. 14. H.4.f. 11. But the Plaintiff muſt declare againſt all. He need not but he may admit another to appeare, and plead after. 7. H.4. 12. But Proces muſt be continued againſt all.

First, touching the perſons: that it ſhall extend, not to Executors onely, but alſo to Executors of Executors, yea to Adminiſtrators alſo, though the Statute ſpeake onely of Executors.

Secondly, touching the actions; whereas the Statute ſpeakes onely of the Action of debt, it is taken by equity to extend to other actions, as the Writ *de rationabili parte bonorum*, and *detinue*, yet perhaps, this latter action will be ſaid not to be maintaineable againſt Executors, for their Teſtators act, but for their owne onely; But we yet are not come ſo farre as to determine what is maintaineable; but whether before all the Executors doe appeare, he or they which have appeared, ſhall be put to anſwer; and ſo to bring it to *deciſion*; whether the action be maintaineable, or not. I thinke alſo that in the action of covenant, and all other actions againſt Executors, as Executors, he which appeareth, muſt anſwer without his companions, though the greater opinion in the *Quadrageſimes* were contrary touching the action of Covenant. But as for the

7. H.6. 35. Executors of Executors by equity. 39. H.6. 45. Bro. Exec. 99. 28. H.6. f. 4. 14. H.4. 23, 24. So negatively. 21. H.6. f. 1. 28 H.6. f. 4. 3. H.6. 35. 39. E. 3. 5. There it is not meerely as Executors, it is out of the ſtat. 11. H. 4. 63. As if in deb. & det.

B Cont. 47. E. 3. 22 So 7. E. 4. 20, 21 3. H. 4. 20 Inſtr. facu. upon a pardon by defendant outlawed at their ſuit. 47. E. 3. 22. Onely Fitz. held in the Affirmative.

sub pœna against Executors, which is to make them to answer to a suite in equity; that hath beene *temp. E.* 4. taken to be out of the reach and intent of the Statute. So also of the *Latitat* in the Kings bench, as was held in the same Kings time, except all the Executors, making up the whole representative body of the Testator, be in the custody of the Marshall, one or more of them who are there shall not be inforced to answer; and so was it also lately held in the Kings Bench, where Master Justice *Houghton* gave an excellent reason, this case is out of the said Statute, *viz.* for that this Writ doth not mention any debt, nor name the Defendants Executors.

8.E.4.5.

9.E.4.12.13.

B

20.vel.21.Jac. regis.

Thirdly, and lastly, that Statute is extended by equity to other Writs or Proces; for where the Statute speakes onely of the Grand distresse, and the Executors appearing thereupon; It hath beene many times ruled, that when he or they appeare upon the Attatchment, *Capias*, or *Exigent*, answere must be, though the rest appeare not; for so the word *Distresse* is taken for all compulsary meanes or enforcement of appearance. But where the Statute reacheth not, *viz.* when the Proces is determined against one or more, as by Outlawry, &c. there the rest must answer by the rules of the Common Law; except it be in the case of Husband and Wife Executor, for there the Wife cannot

B

1.E.4.1.
40.E.3.1.

B

not answer without her Husband, nor doubtlesse can he without her, where she and not he is Executor; but where both be Executors, there he may answer without her, but not she without him. When Executors as Defendants have appeared, if any one of them will confesse the Action, this bindes and concludes the rest; but if one will plead one plea, and the other another, that say some, shall be received which is best for the Testators state; so where they sue, such as will not prosecute, shall be severed, and the rest without them may proceede; and in like manner where they pray to be received to defend their terme, and one of them after makes default; it shall not be the default of all, but the rest, or he, if it be but one who appeares shall be received to uphold the defence of the terme,

Thirdly, so where they pleade a release to the Testator or themselves, one after making default, this shall not be, nor make a totall default in the Executors, to induce a judgement or condemnation against them. Yet in truth each Executor hath the whole of the Testators Goods and Chattells, be they Reall or Personall, and each may sell or give the whole. One of them cannot give nor release to the other his Interest, and if he doe, it is voide, and he who releaseth shall still have as much interest, as he to whom he released, because each had

11.H.4.63. C

Or if but one appeare, 28.H.6. f.364. judgment against all. See 9.E.4.12, 13, 14. where B. who is not Executor is joynly sued with A, & B. confesseth. 21 H.7.25. Yet 7. E.4.8. They may severe in pleas not dilatory C

7.H.6.f.6. per Cottesmore. If they recover and one of them prayes a cap. ad sat. and the other a Fieri. fac. the first as best shall be granted 3.H.4.10. Bro. 44, So where the defendant Outlawed at the suit of two Executors, & upon the Sec. fac. after his pardon but one appeares. 21.H. 7.25. D

9.E.4.12.14.

21.E.3.13.

27.H.8.21.22.

D E

had the whole before, upon this reason long since, where one of the two Executors released but his part of a debt, it was held that the whole was discharged: and so if one Executor grant his part of the Testators Goods, all passeth, and nothing is left to the other, for that each hath the whole, and there be no parts or moyeties, betweene Executors. Therefore, also though a lease for a thousand yeares, of a thousand acres of Land come to two Executors or more, no partition or division can be made betweene them, because it is not betweene them, as betweene joynt Lessees of Land where each hath but a moyety in interest though possession of or through the whole. Amidst Executors, each hath the whole, and therefore if he graunt his part he graunts the whole. But one Executor may demise or grant the moyety of the Land for the whole terme, and so may the other doe, and this way they may settle in friends or others trusted for them, a moyety for each; either in severall or undivided; but one of them cannot make a lease to the other of any part, for he had the whole, nor can one sue the other as Executor, yet if the Testator devise to one of his Executors, all his goods after such debts and Legacyes satisfyed, there after those satisfyed, that Executor may take the Goods and maintaine an action of Trespasse against the other

C

If an horse come to foure Executors, each hath an horse, and yet all foure have but one.
27. H. 8. 21. 22.

E

D

B

6. H. 7. 5.

other Executor, if he take them from him, and consequently an Action of *Detinue*, for keeping or detaining them: but this is as Legatee, his owne assent perfecting the Legacie.

The possession of one Executor, is the possession of all the rest; so, as if one appearing to a Sute, and the other making default, in whose hands all the goods be which are not administred, if, I say, here hee that appeares, pleades that he hath nothing in his hands, this shall be found against him; for whatsoever any of the co-executors hath, hee also hath, and is in his possession, and so shall the Creditor recover, and have judgement to be satisfied out of the Testators goods, as in his hands. And therefore if goods be taken from one, all may maintaine an Action of Trespasse thereupon; for the possession of one is the possession of all. But the possession of one shall not be, so the possession of all, as to charge the others owne goods wherof more elsewhere.

14. H. 4. 12. Bro. 12.

All must sue. 19 H. 6. 65. conte. 24. E. 3. 40. & 42. E. 3. 26. It may be in his name only from whom taken; nor need he be named Executor Bro. Ex. 31. 39. H. 6. 45.

Where two Executors be made, the one making a Will and executors, and dying; if the other die after intestate; now shall not the Executor of him who first dyed be Executor to the first Testator, but hee is dead intestate, because the surviving Executor is so dead; and in him the Executorship was wholly, and soly setled by the death of his

32. H. 8. Bro. Ex. 149.

39 H. 6. 45.

fellow before him: So Administration, *de bonis non admin.* shall be committed.

Co. lib. 5. f. 97.

H

Chapman & Dalton case. Plow.

The Executors, or Executor, if but one so represents the person of his Testator, that hee is in Law his Assignee by the very making of him Executor; so as if one covenant to make a Lease to *I. S.* and his Assignes by such a time, and *I. S.* dieth before that time, and before the Lease made; now must the Lease be made to his Executors as his Assigne, representing his person; so also in a condition to pay to the Feoffor or his Assignee, yet a Lease to *A.* and his Assignes during the life of *B.* shall not goe to the Executors of *A.* So where in a generall pardon by Parliament, there is an exception of persons outlawed after judgement, unto the person so out-lawed, shall satisfie the Creditor, who hath out lawed him. If the Out-law die before this done, his Executor as representing his person, may make satisfaction, and so make the benefit of the pardon to extend to his Testator, for saving his goods, as if himselfe had satisfied his Creditor, though he left him unsatisfied, when he left the world, *& dem obiit extremum.* Yet where *A.* sold Land to *B.* upon *Proviso*, that if he payed to *B.* his heires, or assignes, &c. *B.* died, *A.* payed at the day to his Executor, and it was doubted that it was not good, for the

Sir Edward Phittons case, Co. lib. 6. f. 80.

A

So where the statut. of *W.* 1. gives time for proofe to him whose goods were wrested. His Executors may doe it; if he dye before the time. *Co. l.* 5. 107. *b.*

Co. lib. 6. f. 80. Also Executors shall have restitution of stolne goods, and a Writ of Error; yet the Statute speakes but of the party.

it

the word Assignee could not reach to him being no Assignee of the Land: and where the Executor brought an action of account upon a receipt by the hands of the Testator; the Defendant could not be admitted to wage his Law; for that this was held a receipt, *per autermains*; yet it is cleare, that if one by Bond or Covenant tye himselfe to pay such a summe at such a day, not mentioning his Executor at all; yet is the Executor bound, as included in the name or person of the Testator. And where the Statute 23. of *Henry* the eight, gives the Writ of attaint (in the course there mentioned) against the party that had judgement, it lieth against his Executors if hee be dead; but thereof another reason is given. where a man was bound, that hee would not sue upon such a Bond, and he dyed, and his Executor sued; this was held to be no forfeiture of the Bond. So where one was bound to pay ten pound within a moneth after request made to him, and hee died before request; it sufficed not to make it to the Executor, as *Manwood* said. It was likewise held that the warrant of Atturney put in for the Plaintiffe in debt, sufficeth not for his Executor to bring a *Scire Fac.* upon the judgement. And if Executors sue execution upon a Statute in the name of a Conusee, as if hee were alive, this is voyd, and they may sue out new

2 El. Dy 280. Contr. where to pay to A. the Feoffer his heire or assigne. Co. lib. 5. f. 97.

2 Eli. Dy. 183.

3. Eliz. Dy. 201.

H 27. H. 8. 16.

M. 15, & 16. El.

I 34. El. vel circiter Titherley & Lexcor Walsh. in ba. reg.

I 36. H 8. Bro. stat. Marchant. 43.

K 2. R. 3. 8.

extent, and this they may doe without any *Scire facias*, as well as the Conusee might, if he had beene alive. But by *Hussey* Justice, if the Conusor in a Statute staple be returned dead by the Sheriffe upon the extent; a *Scire fac.* must be sued out before extent proceed; and upon a judgement had, if the recoverer dye before execution, his Executor cannot as himselfe might, sue out execution without a *Sci. fac.* as is there said. Yet if after a *Capias ad sat.* awarded, the Plaintiffe dye before it be executed, the Sheriffe may proceed to the taking of the party, and is not subject to any action of false imprisonment, nay, if he suffer him to escape he is chargeable, as *temp. Elizabeth* it was resolved upon the motion of *Anderson*; but withall it was held that reliefe might be by *Audita querela*. Like resolution was in the Kings Bench, After some doubt by *Wray*, and the other Judges, where the Defendant dyed after a *Fieri fac.* awarded, and before it was executed, that the Sheriffe might proceed upon the Goods in the hands of the Executors.

H I
15. H. 7. 14.
F
15. E. 3. Respond. 3. contr. upon a Stat. Marchant.

K
Cinte No. n. br. 267. upon a Recogniz.
I.

H
30. Eliz. rot. 32. in ba. reg.

But if the Defendant in an action of debt, upon a bond plead a tender at the time and place of payment, and tenders the money in Court, where it rests and then he dyes, now shall not the Plaintiffe, have this money, because the property thereof is changed, and be-

become the Executors, as was held in the Common pleas, but he is put to a new suite against the Executor. Yet where judgement is once given in a Writ of Partition, for a termer, or in a Writ of Account, if the Plaintiffe dye before the second judgement needfull in both cases, the Executor is not put to a new suite, but may proceed by *Sci. Fac.* upon the former judgement, as the Lord *Anderson* held upon the motion of *Fenner* Serjeant. Though before we found the Executor not in points penall, all one with the Testator, yet in points beneficiall, the Testator includes him in some cases, as where an Abbot granted to his Lessee to take Estovers in another ground, it was held that his Executor though not named should enjoy this, during the terme as well as himselfe should have done. And whereas the Stat. 23. of *H.* the 8. gives costs to a Defendant against a Plaintiffe, suing for a wrong, or breach of promise, or the like, done to the Plaintiffe against whom it passeth by verdict or nonsuit; it hath beene resolved that an Executor suing upon such wrong or breach, of contract to his Testator made should not pay costs because he is another person then the Testator; and so is it usuall in experience. But if in such suite, the Atturney of the Executor mis-behave himselfe towards him, and for this the Executor sueth him,

P 32. Eliz. vel circ. eite.

I

Pas. 28. Eliz.

H

Trin. 36. Eliz. in bb. reg.

H M

Pa. 43. Eli. in cim. ba.

him, here if it passe against him in manner as aforesaid, he shall pay costs, because this was a suite for a wrong done to himselfe.

I. If *A.* recover a debt as Executor of *I. S.* and makes *B.* his Executor, and dye before execution sued, *B.* is not put to new suite, but may have execution upon that Judgement: But if *A.* or *B.* dyed Intestate, now could none as Administrator to either of them, nor as Administrator of *I. S.* have execution of this Judgment; for the former hath no interest in any thing partaining to *I. S.* and the latter commeth to title above the judgement, *viz.* as immediate administrator to *I. S.* who is now dead intestate: and derives no title from the Executor, who recovered.

M. 38 H. 8.

If a Conusee have a Certificate into the Chancery, upon a Statute, and then dyes, before extent taken out, his Executor is put to a new Certificate, and for obtaining of it, must make Affidavit, that no extent hath yet been taken out.

2. El. Dy. 180. I.

M. If an Alien joyne with his Wife, who is Executor in a suite for debt, and it commeth to Issue, he shall not have tryall *per medietatem alienig.* or *Lingua* as should be if he otherwise were party to a triall, as was held in the case of Doctor *Julio.* Yet if a noble man sue as Executor to another, not noble, he shall for his nonsuite be amerced five pound, as if he sued

ſued in his owne right, as was conceived 21. *E.* 4. 77. By the ſame rule and reaſon doubtleſſe a Noble man ſued as Executor, ſhall not be arreſted, nor ſhall any *Capias* be awarded againſt him for not appearing. And if any triall ſhall be of any iſſue, there ſhall be two Knights of the Jury, as in other caſes where a peere is party. Likewiſe where the Wife is to have her convenient apparell, whereof the Executor muſt not bereave her; If ſhe be a noble woman, it ſhal be anſwerable to her degree

If one Executor onely ſell goods of the Teſtator, he alone may mainetaine an Action of debt for the money. So if goods be taken out of the poſſeſſion of one Executor, hee alone may mainetaine an action, and that without naming himſelfe Executor. A 38. *E.* 3. 9. N

Some touch hath beene before of Summons, and ſeverance, whereabout be this added. If one Executor will not, or cannot joyne in ſuite with the other, ſo as he is ſummoned and ſevered, now by his death, after the ſuite is not abated, 16. *Ed.* 2. *Fitzh.* 111. yet if he live till judgement, he may ſue execution, ſay other Bookes, 13. *Ed.* 3. *Fitzh. Exec.* 9. 11. *R.* 2. *Priviledge* 2. yet *Quæ.* of that for he cannot acknowledge ſatisfaction, as hath beene ſince reſolved. *Mich.* 14. & 15. *Eliz. Dy.* 319. And the reaſon thereof being becauſe he is no party to the judgement, by the ſame reaſon P O 3. *H.* 7. 1. & 5. *E.* 2. *Fitz. brev.* 802 *Contr.* 38 *E.* 3. 13. & 20. *E.* 3. 111. *accord.* 78.

can

can he not ſue execution upon it, for how can he have execution for whom there is no judgement given, now the recovery is onely in the name of the other Executor, yea, by the ſaid laſt Booke, it ſeemes that after judgement had, he cannot releaſe the debt, becauſe it is now altered in nature, and turned in *rem judicatam*, though at any time before judgement he might have releaſed it as both that laſt booke ſaith, and the two precedent *temp. Ed.* 3. *Rich.* 2. yea in an action of account, after judgement had, that the Defendant ſhall account, the releaſe of him ſevered, is a good diſcharge to the Defendant, as was reſolved 48. *Ed.* 3. 14, 15. but this is not a plenary judgement, for nothing is recovered thereby but another judgement is to be had after the account, which may be againſt the Plaintiffe, ſo as this releaſe came before any debt or duty adjudged. What if the Defendant be had in execution at the ſuite of the Executor, who proſecutes it, and eſcapeth; whether may the ſevered Executor diſcharge the Sheriffe or Jaylor by a Releaſe, I thinke he may not.

P By that above it is plaine, that if any one of the Executors Plaintiffes dye, the Writ is abated, onely where he ſo dying was before ſevered; opinions have beene different, as above appeares. So alſo is it, if one of the Defendants Executors dye. Yea, if the Plaintiffe

2. *H.* 4. *f.* 14.

Creditor

Creditor ſue *A. B.* & *C.* as Executors, where onely *A*, and *B.* are Executors, there by the death of *C.* the Writ abates, or falles to the ground, yet *A.* and *B.* as I thinke might have pleaded in abatement, that they onely were executors, traverſing that *C.* was not Executor, but the Booke doth not ſo reſolve. See *46. E 3 f. 9. 10.* P *9. E. 4. 12. Bro. 34.*

As *A.* and *B.* above might admit that Writ againſt them and *C.* So if the Writ or ſuite had beene againſt *A.* onely, and he ſo admit it not pleading in abatement, the recovery againſt him alone is good *9. E. 4. 12.* A

One that is Out-lawed or attainted in his owne perſon, may yet ſue as Executor, becauſe this ſuite is in anothers right, *viz.* the Teſtators: But he that is excommunicate cannot proceed in ſuite as Executor, becauſe none can converſe with him without being excommunicate, as a Booke ſayes. Yet doth not this excommunication pleaded, abate or overthrow the ſuite, but make that the Defendant may ſtay from anſwering his ſuite, untill the Plaintiffe be abſolved and diſcharged from his excommunication. *21. H. 6. 30.* M *21. E. 4. 49. 69. 42. E. 3. 13. 24. H. 6. 14, 15. 3. H. 6. 40. Litt. 44. Co. lib. 81, 89. 11. R. 2. Excom. 25.*

CHAP. X.

Of the Poſſeſſion of Executors, or their actuall Having.

1. *What ſhall be ſaid, ſo to come to their hands, as to charge them.*
2. *What ſhall be ſuch a getting, or going from them, as to excuſe them.*

WE have before conſidered what things ſhall come to Executors, and being come ſhall be Aſſets in their hands. Now for that it is ſaid in *Reedes* Caſe, that an Executor ſhall not be charged with, or in reſpect of any other goods than thoſe which come to his hands after his taking upon him the charge of the Executorſhip. Let us now examine what ſhall be ſaid, and accounted ſuch a full and compleate comming to the hands of Executors, as ſhall make them within the reach and charge of Creditors, and Legatees, *viz.* For the payment of debts and Legacies. As touching debts due to the Teſtator, it hath before beene ſhewed, that untill Judgement and execution had; they bee not Aſſets in the Executors hands. Now then, as touching

Coſib. 5.

ing other goods or chattels poſſeſſory, which are of two kindes, *viz.* reall, and perſonall: Let us put the Caſe thus. The Teſtator at the time of his death hath a flocke of ſheepe in *Comberland*, Corne in the Barnes in *Cornewall*, Bullockes in *Wales*; fat Oxen in *Buckſhire*; Money, Houſehold-ſtuffe, and Plate in *London*, a Leaſe for yeares in *Norfolke*, and his Executor dwelt at *Coventry*, *viz.* farre from all theſe places, what kinde of poſſeſſion ſhall the Law judge this Executor to have in every of theſe, inſtantly upon the Teſtators death, and before he come where any of the things be, either to ſee or ſeize upon them? In all the particulars above mentioned the Law is all one, except the Caſe of the Leaſe for yeares, which if it be of Land (as is moſt uſuall) then becauſe it is a ſetled and immoveable thing; the Law doth not reach to it the foote of the Executor, to put him in actuall poſſeſſion, for *Poſſeſſio eſt quaſi pedis poſitio*) untill himſelfe, or ſome for him do actually enter therupon. Nor indeed need the Law helpe or ſupply the want of actuall poſſeſſion in this Caſe, as in the caſe of moveables; ſince Land cannot be carried away as goods may, and therefore is not ſubject to purloyning or imbeſilment as moveables are. But if the Leaſe for yeares, were of Tithes, the Executor, though in never ſo remote a place from them, ſhall be inſtantly Perk. 6.b.

upon the ſetting out thereof in actuall poſſeſſion of them, ſo as he may maintaine an action of Treſpaſſe againſt any ſtranger which ſhall take the Tythes ſet out, though he, nor any for him did ever before poſſeſſe any of the ſaid Tythes, or came neere unto them. But if the caſe were of a Leaſe for yeares of a Rectory conſiſting not onely of Tythes, but alſo of Gleabe Lands, into which entry may be made, as alſo Livery of ſeaſon in it, then it may perhaps be ſome queſtion, whether ſuch an actuall poſſeſſion in Tythes, ſhall be given by the Law to an Executor, neglecting to enter or not entrying into the Gleabe Land. And ſo I leave the conſideration of Chattells Reall,

45.E.3.17. 21.H.6.43.

Touching things Perſonall, in which the Executor hath ſuch an actuall poſſeſſion, preſently upon the Teſtators death, as that he may maintaine an action of Treſpaſſe againſt any ſtranger taking them away or ſpoyling them, though he nor any for him ever came neere them: whether yet this ſhall be ſuch a poſſeſſion in the Executors, and ſuch a comming of theſe Goods to their hands, as to charge them with payment of debts and Legacies, yea to make their owne Goods lyable inſtead of theſe, is a point worthy of conſideration.

9.E.4.50. Plow.com.281. 32.H.6.13. 14.H.8.23.

And doubtleſſe, this throughly ſifted, will prove

prove a eaſe miſchievous, whether way ſoever the Law be taken, for firſt it muſt be admitted that without the Executors laying his hands actually and particularly upon the Goods in the Houſe or Fields of the Teſtator, whether the Executor hath reſorted, he ſhall be ſaid ſo in poſſeſſion, as to ſtand lyable unto the Creditors, ſo farre as they extend in value, though after, others purloyne or imbeſill them. Now then if diſtance of place ſhall make difference, where ſhall be the bound and limit of that diſtance, and if the Executor may come at a ſtrangers taking or poſſeſſing of the Goods, it is miſchievous to Creditors.

On the other ſide, if it ſhall be laid upon the Executors to anſwer for all the Goods whereof the Teſtator dyed poſſeſſed, it will be miſchievous for them and deterre them from taking Executorſhip upon them, ſince much purloyning, may be even of money, Iewells, and Goods by Servants and others, about the Teſtator, or where theſe things be. I thinke therefore, that if without any fraud, colluſion, or voluntary conniving on the part of the Executors, they be prevented by others, of laying hold on the Teſtators Goods, ſo as that they may diſpoſe of them; eſpecially, if it cannot be knowne by whom they are ſo purloyned, and imbeſilled, or if they

be perſons fled, or inſolvent, that then they ſhall not ſtand upon their ſcore, as Goods come to their hands, in reſpect whereof, Creditors or Legatees ſhall draw ſo much from them, even out of their owne Goods, as in other caſes where they have, no ſuch excuſe ſhall be.

13. H. 6. cap. 1. And of this minde I the rather am, becauſe I finde the whole Realme in Parliament, takeing notice of ſuch prevention of Executors, comming to the Goods of their Teſtator, by the wrongfull act and imbeſilment of others, without any default in themſelves. And in this Caſe the Parliament hath given ſpeciall remedy, *viz.* that Writs ſhall be directed to Sheriffes, to make open Proclamation for the appearance of the parties delinquent in the Kings Bench, at the day limitted, and in default thereof they ſhall be attainted there of felony, the Writ being returned executed, *viz.* Proclamation made. But note that this Proclamation is to bee made two Market dayes, within twelve dayes next after the Delivery of the Writ, and the laſt Proclamation muſt be fifteene dayes before the day of appearance. And theſe Proclamations muſt be made in ſuch Cities, Burrowes, or Places (ſaith the Statute) not expreſſing what is meant by the word ſuch, and therefore, meaning doubtleſſe thoſe in which the act

act or offence is committed. So that if the fact be not committed within the limits of ſome City, Burrow, or Market Towne, no remedy is to be had by the Statute; for that the Proclamation is to be made upon Market dayes, in the place where, &c. Now beſides other Places, even ſome Burrowes, *viz.* Townes, ſending Burgeſſes to the Parliament, have no Markets, and ſo are no Places within the Act. Alſo two Executors muſt require this Writ, therefore where there is but one Executor, no reliefe is given by this Law, for it is penall, making felony, and therefore ſhall not be extended by equity beyond the Words. Laſtly, it extends but to the Executors of Lords and Perſons of good degree, and onely to the Treſpaſſing ſervants of ſuch Perſons, not to other ſtrangers, purloyning the Goods. But now who ſhall be ſaid to be Perſons of good degree, not being Lords, I will not much labour to decide, the rather becauſe I have not heard, nor read, to my remembrance, of any Action brought upon this Statute, but I thinke that good degree muſt ſtay either at a Knight, being the loweſt dignity, or at a Gentleman, being a degree of Worſhip, as elſewhere is ſhewed, and not ſtoope any lower.

And the ſaid Statute ſeemes in ſome ſort to imply an opinion this way, which I incline,

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in that it expresseth this purloyning to be an impediment of the execution of the Will, whereas if the Executors shall answer and make good to Creditors and Legatees, out of their owne state and Goods, for these imbesilled, the execution of the Will is not hindered, but the Executors are damnifyed in their owne private value, yet it may be said on the other side, that some things given in *specie* by the Will, such a peece of Plate, such a Furniture of a bed or Chamber, such a Jewell may be purloyned, so that the Legatees can never have them, and consequently the execution of the Wil be hindered, though some recompence be made by the Executors, but how these Legatees shall recover recõpence in such cases; for that Legacies are not to be recovered by Suite at the Cõmon Law, I must leave to the Professors of the Common or Civill Law to informe me. But if the Executor be of secret assent to this imbesilment, whereof even the forbearance to sue for the recovery of the things, or the value of them in dammages, if knowne where they, or the imbesillers bee, is a shrewd evidence, or proofe, Then shall the Executor be adjudged an haver of them, and so stand charged as having them, for *Pro possessore habetur qui dolo desiit possidere*. And if in any Case the taker by prevention from the Executor before his knowledge perhaps, of the Testa-

tors

tors death, or at leaſt, before his poſſibility of repaire to the place, where the goods were, to put them in ſure Cuſtody; if I ſay, ſuch actor keepe theſe goods from falling upon the ſhoulders of the Executor, they ſhall ſurely fall upon himſelfe, and make him chargeable at the Creditors ſuite, as an Executor of his owne wrong.

Of Goods loſt by or (But put we the caſe) gotten from Executors (for thereunto ſhall be our next ſtep) that Goods come fully into Executors poſſeſſion and hands, but be againe loſt or gotten from them without any default in them; Shall they yet ſtand anſwerable out of their owne Eſtates for them? Surely hereabout two diſtinctions muſt be made as I take it.

The firſt whereof I derive from our learning touching eſcapes of perſons taken in Execution, and impriſoned, if ſuch be reſcued by Alien enemies, the Sheriffe or Gaoler ſhall not anſwer out of his owne Goods for this debt, otherwiſe if it be done by Subjects, againſt whom remedy is to be had by the courſe of Juſtice: and ſo ſhould I thinke it to be touching Executors, *viz.* that if enemies landing (as neere the Sea Coaſt may eaſily, and often happen) ſhall take away Cattell, or Goods from an Executor, hereby he ſhall be excuſed, contrariwiſe ordinarily, if the ereption or direption, be by ſubjects knowne and actionable. 33. H. 6. 1. 16. E. 4. 2. 3. 7. Eliz. Dy. 241.

Another difference I shall thinke may probably be taken from the rules of our learning touching Bailement. If *A.* deliver Goods to *B*, to keepe as his owne, or genererally, *viz.* without any speciall undertaking by *B.* to keepe them safely, and without any money or other valuable consideration, given for the safe custody; Here if *B.* be robbed of them, he shall not make satisfaction to *A.* for them; and so if they be stolne from a Servant, or Factor. But if they be taken away by a knowne Trespasser, not feloniously, some opinion hath beene, that the Keeper shall make recompence, because he hath remedy for recompence, or satisfaction from the trespasser, yet of this latter I should doubt, because *A.* himselfe as well as *B.* may have this Action for dammages against the Trespasser. Now an Executor is of the nature of such one having the custody of another mans Goods, and I have seene in a manuscript entire, the Writ of Trespasser by the Executor, expressing goods of the Testator in the Custody of the Executor to be taken from him; therefore me thinkes he should no otherwise be charged then *B.* to whom Goods were as above is said delivered to be kept. For the Executor haply shall have no benefit nor advantage by the Executorship, all the Goods not sufficing perhaps to pay debts, and Legacies, which is the state we

Vide 29. Ass. p. 28. 8. E. 2. Fitz. Detin. 59. 9. E. 4. 90. 13. H. 7. 4. Co. lib. 4. f. 83, 84.

In custodia sua exist.

we moſt thinke of, *viz.* where Goods want to pay debts, and Legacies, for where there wants not, the queſtion need not be made. Yet a ſervant or Factor, who hath wages for his ſervice, is not thereby made lyable to ſatisfie for things in his cuſtody ſtolne, becauſe he hath not for this particular cuſtody, any compenſation, ſo of an Executor, if perhaps benefit might accrue to him by the Executorſhip, as happely the diſcharge of a debt owing by himſelfe, &c. Other Caſes there be, wherein the Executor will ſtand more clearely diſcharged. As if the Teſtator left a Leaſe for yeares, ſtate by extent, wardſhip, or other Goods whereto he had but a defeſible title, and they be evicted after his death. So if he left a Ship at the Sea with much Goods and Merchandiſes, which are drowned in the returne, never arriving in ſafety.

So alſo if he left a flocke of ſheepe, tainted with the rot, which dye ſhortly after him, in none of theſe three Caſes doubtleſſe ſhall the loſſe fall upon the Executor. But to put a Caſe of more doubt, what if a Leaſe for yeares come to an Executor, ſubject to a Condition for payment of Rent, or a ſumme in groſſe, and the Executor failes in payment, whether ſhall this loſſe fall upon the Executor, to be made good to Creditors, or Legatees out of his owne ſubſtance, or not? To this I muſt

anſwer by this diſtinction, *viz.* If the Executor had taken the profits of this Land ſo long as to furniſh him with money for this payment, or if he had other Goods of his Teſtators in his hands to ſupply the payment, then is it his default that the money is not payed, and he muſt beare the ſmart thereof: otherwiſe not, for he is not bound to make payment out of his owne Goods, yet is he a ſullen and unkinde Executor who will not ſo doe, when as he may repay and ſatisfie himſelfe by the profits thereof after. Like Law if the Executor ſuffer a bond of a hundred pound to be forfeite, for not paying of fifty pound, having ſufficient in his hands. So alſo of a Recognizance, Statute, or Judgement, defeazanſed upon payment of a leſſe Summe; yea, a leſſe doubt of all theſe Caſes, then of the forfeiture of the Leaſe for yeares, for haply the Executor had time to have ſold the Leaſe, and made money thereof, towards the payment of Debts, the omiſſion and neglect whereof may be imputed unto him as a default juſtly occaſioning recompence to be by the Law required from him. But perhaps he may excuſe himſelfe that he could not find a Chapman who would give him to the value thereof: hereunto yet reaſon can eaſily reply, that it had beene much better to have ſold it under the value, then to have loſt the whole value,

Ita Quæ.

by

by exposing or abandoning it to a totall forfeiture.

CHAP. XI.

How farre, and where an Executor having Assets is chargeable or lyable to Action.

HAving considered what things shall come to Executors and be Assets in their hands, for the performance of the Will. Let us now consider what thing the Executor is bound to pay, satisfy, or performe, and what not, where he is chargeable, and where not, this being admitted, that he hath Assets, *viz.* sufficient wherewith to performe.

Here we will consider of these parts.

1. *Of Debts by Specialty or Record.*
2. *Debts or duties by Contract without Specialty.*
3. *Debts without either Contract or Specialty.*
4. *Covenants by Deed or Specialty.*
5. *Wrongs done by the Testators.*

TOuching Debts by Specialty, which are the most usuall and common obligements,

it will not be impertinent to give a little light touching the validity of a Specialty, and the extent of it to Executors. The moſt doubt will ariſe upon Bills, and ſuch Writings, Obligatory made, not by Scriveners, nor Clarkes, in common forme, but by others, otherwiſe for haſte, or through ſimplicity. Thus long ſince we finde a Writing made by *A.* to *B. Memorand.* that I have received of *B.* ten pound, which I promiſe to pay, &c. This being ſealed and delivered, was held a good Obligation by *Brian* and *Cottesby*. So if the words had beene onely, I ſhall pay to *B.* ten pound, and whether ſuch words or the like, as Covenant, or Grant to pay, be in the forme of a Bill or Bond, or in an Indenture or Articles, it is a ſufficient ground for an Action of debt. And though it ſhould be miſwritten *Wigint.* for *viginti.* or fifteene for fifteene, yet ſhall it be favourably conſtrued, and beld a good ſpecialty of debt, as hath beene reſolved in theſe and like caſes; and ſo alſo notwithſtanding, falſe Latine in the Obligation, or the plurall number for the ſingular number, or words of repugnancy or non-ſence, yet if there be words whereby it appeares that *A.* is a debtor to *B.* and it be ſealed and delivered, it is a good writing Obligatory; yea though it want the words of concluſion, *viz.* in witneſſe whereof as the Lord *Dyer* reports, to have beene reſolved, although

22.E.4.22.

29.E.3.F.Dat. 166.

9.H.6,7. 2.H.4. 8. 23.Eliz.M.5.

9.H.7.16. 2.H.4.8.

28.H.8.Dyer.22

28.H.8.Dy.19. & 22.

though

though the contrary were held in foure ſeverall Kings times before as our Bookes ſhew. Now any ſuch Writing Obligatory doth determine or drowne any duty by Contract, becauſe Specialty is of a higher nature, So as if *A.* and *B.* doe bargaine with *C.* to pay him a hundred pouud for Corne or other thing, and after *C.* take ſome ſuch Writing Obligatory, as aforeſaid of *A.* now by this is *B.* diſcharged of the debt, becauſe he ſtood charged onely by the Contract, which is extinguiſhed by the ſaid Specialty.

40. *E.* 3. 1. 7. *H.* 7. 14. *E. H.* 6. 36. 22. *H.* 6. 15. 21. *E.* 4. 81. 3. *H.* 4. 17. 11 *H.* 4. 76.

As for the extent and operation of theſe Specialties, to, and upon Executors, we muſt know that an Executor doth ſo repreſent the perſon of the Teſtator, and is ſo included in him, as that every Bond or Covenant by the Teſtator made for payment of money, or the like, reacheth to the Executor, although he be not named, *viz.* that he doth not Covenant for, nor binde him and his Executors by expreſſe words (and yet the Heire not named is not bound, though there be never ſo great Aſſets, or Land diſcend unto him.)

So reſervation of rent, grant of annuity. 28. *H.* 8. *Dy.* 14. & 22.

47. *E.* 3. 22. 32. *H.* 6. 32. 10. *H.* 7. 18.

Now touching debts upon Record, much need not to be ſaid, (except of thoſe by Statute Marchant) for to debts and dammages already recovered againſt the Teſtator, and to debts by Recognizance the Executors liableneſſe, is ſomewhat cleare and conſpicuous.

No mention of Executor in the judgement, yet he charged.

Yet

Yet other inferior debts upon Record, may fitly be thought of, as Issues forfeited, Fines imposed by Justices, at *Westmin.* or at Assises, Quarter Sessions, Commissions of Sewers of Bankrupts, By Stewards in Leetes, or the like, for all these are debts of Record, which Executors stand charged withall. So also if the Testator were before Auditors found in Arrerages of Account, being a Bayly, or receiver: For these Auditors are by Statute Judges of Record, but if the Account were made onely before the party to whom the Arrerages pertained, or but before one Auditor onely, it is out of the Statute, which speakes of Accounts before Auditors in the plurall number. Therefore the Executor not chargeable, because the Testator might wage his Law in those cases, not in the former.

9.H.6.f.11. 11.H.4.64.92. Otherwise of a Garden in Soccage, he is out of the stat. *W.2. cap.* 11 *ut credo. Co.lib.* 10.103.

And whereas exception was before made of a debt by Statute Marchant, it was by reason that the Lord *Bro.* tells us that if the *conusor* in that case be returned dead no remedy appeareth for the Conusee to have execution of the Goods of the Conusor, but onely of his Lands. If this should be thus, it were a very mischievous case: for many bound in Statutes have no Lands but Leases and goods of great value, and if by their death, their Goods and Chattells should be set free from this Statute, and the Creditor without remedy, the Law were

36.H.8. *Bro. Syar. Mar.* 43.

were very defective: and it were so much the more strange in this Case, because the Statutes of *Acton*, *Burnell*, and *Mercatoribus*, seeme to pitch principally upon Goods, and to tend unto assurance betweene Merchants, who usually are not Landed men. But that the Law doth give remedy in such Case, as well against the Goods as Lands of the deceased Conusor appeares by the resolution of late, made in what Order, and Precedence, Statutes are to be satisfyed by Executors, as after wee shall see.

Of Debts by Contract without Deed, as Leases Parol, &c.

CONtracts are of diverse kindes, and we will begin with those in the realty, as most worthy. If therefore one be Lessee for yeares, or for life, without any Indenture or Deede, (as he may be) and his Rent being behinde, he dyeth, now is the Executor lyable to the payment of this Rent, without any Specialty, for that his Testator, if he had beene sued in his life time, could not have waged his Law. But if the Lessee for yeares, in his life time, sell or grant away his terme or Lease, although he still lye at the stake for the Rent, to grow due after, untill the Lessor accept the Assignee for his Tenant, Yet if the Lessee dye, 21. H. 6. 1. 44. E. 342. 44. E. 3. 5. 7. E. 3. 11. 14. H. 7. 4. per Keble vide 8. E. Dy. 247.

his Executor shall not be charged for any Rent due, after the death of his Testator. But what if the Lessee doe not Alien or assigne his terme, but dye thereof possessed, and the Executor perceiving the Land not to be worth the Rent, Waiveth the same. Yet the Lessor will not enter thereinto, nor intermedle therewith, whether may he yet charge the Executor with the Rent, during the terme? I answer that if he have assets, that is sufficient for payment of this and other debts, he cannot Waive this Lease, but shall be tyed to answer this rent, though much more then the Land is worth, for the taking of the Lease is much of the nature of an Obligation to pay money; Yet because it is yearely Executory, the Executor may Waive it, in case his Testators estate will not supply and beare that losse. But what if there be assets to beare this yearely losse for some yeares, but not during the whole terme? I think in this case the Executor must pay the Rent, so long as this Assets will hold out, and then must Waive the possession, giving notice to the Reversioner; and this I thinke he may doe well enough notwithstanding his Occupation of the Land divers yeares after the Testators death, because that was not voluntary, but as of necessity; yet this I leave as a *Quære*, to be well advised of with good counsell.

M. 32. & 33. Eliz. in com. ba.

Do. & Shi. 121.

Of

Of contracts perſonall.

VVHere the Teſtator might wage his Law there the Action lyeth not againſt the Executor; as hath beene touched, and therefore he is not chargeable in an action of debt upon a ſimple contract, as by reaſon of this or that to his Teſtator; yea though it were the Inheritanee of Land, which was ſold ſo as the ſale were without Deed, or though by Deed, yet if no counterpart were under the hand of him to whom the ſale was made. And the cuſtome of *London*, to the contrary, *viz.* that an Action of debt ſhould be maintained againſt Executors upon a contract was held void at leaſt no Good plea againſt other Creditors that ſuch a debt was recovered againſt the Executor, or paid by him, as was towards the latter end of the late Queenes time reſolved, though in the beginning of her time it was a demurrer. Yea, though ſuch a debt grew for the moſt neceſſary thing, *viz.* meate and drinke, which bindeth even an Infant to payment, yet will it not charge the Executor of a man of full age, but this is meant where the contract was onely by Word, for where the Teſtator putteth his Seale to any Deede or Writing made upon ſuch ſale, this is more then a ſimple Contract, and taketh from the

41. *E.* 3. 23.
15 *E.* 4. 25.
Except by a *Quominus* in the Exchequer, for the Kings debtor. *Co. lib.* 9. *f.* 98. *a.* So of accounts except for the King.

M. 33. & 34. *El. in com. ba.* By three Iudges, & 37. *Eliz.* By all, as I finde in my report, but *Co. lib.* 5. *f.* 82. *b.* it is contrarily reported.

3. *Eliz. Dy.* 196. Demurrer.

9. *E.* 4. 51. 10. *H.* 7. 8. 15. *E.* 4. 16. 22. *H.* 6. 13. 30. *H.* 6. 186. There though a common hoſtler or victualler, truſt his gueſt, he loſeth his debt by his death. *Co.* 96. 87. *b.*

Vendee his wager of Law, and ſo chargeth the Executor. But if the Teſtator ſeale but unto a tayle or tally, with ſcotches, expreſſing a debt, this is no ſuch Specialty as ſhall charge Executors. Yet in ſome Caſes without any ſeale at all, the Executor is chargeable. But although no Action of debt lyeth againſt the Executor upon ſuch a ſimple contract, yet may the Creditor, in that caſe, maintaine an Action upon the Caſe grounded, upon the aſſumption implyed, though not expreſſed, as now ſtandeth reſolved by all the Judges of all Courts at *Weſtminſter*, though heretofore there hath beene much difference of opinion thereabout: And indeed thus the Executor is charged, in matter for a ſimple contract, though not in manner of a Debt; but as for breach of promiſe, making recompence in dammages, inſtead of the debt. And the chiefe reaſon, for it is becauſe the Teſtator could not have waged his Law in this action upon the caſe againſt himſelfe, though in debt he might. Where the Teſtator retaineth ſervants in Huſbandry, or otherwiſe, and dyeth, there being wages due to theſe ſo retained, the Executor is lyable to an action of debt for the ſame, by reaſon that the parties were compellable by Statute, thus to ſerve, and therefore the Teſtator could not have waged his Law; but in caſe of Servants not compellable, as Wayters

22. H. 4. 33. But if the ſumme be alſo written on it, they are bound as by a Deed. 18. H. 8. Dy. 23. a.

Slades Caſe, 5. lib. 4. Co. l 9. 87. *Pinchons* Caſe.

2. H. 4. 24.

4. H. 6. 18.

or

or Servingmen, as wee call them, no action of debt lyeth againſt the Executor, for their wages, though againſt the Teſtator himſelfe it doth: for the Contract is ſufficient to charge him who made it. See of account after.

11. H. 6. 48. So 2. H. 4. f. 14. Servitors in the warre by contract.

Where Executors ſhall be charged without either Contract or Specialty.

VVHere a Priſoner oweth money to a Jaylor, or Keeper of Priſon for his dyet, or victualls, and dyeth, his Executor ſhall be chargeable for this debt, becauſe it is for the Common wealth to have Priſoners kept, which cannot be without affording them victualls: Alſo, where one hath a Pattent, or Tally of the Exchequer, to receive money of ſome Cuſtomer, Receiver, or other Officer of the Crowne, and delivereth it to him, he then having money of the Kings in his hands, if he pay not the ſame, but dye, his Executor ſhall ſtand chargeable with the payment thereof. So for Arrerages of Account before Auditors, if more then one, but this is debt of Record in Law.

27. H. 6. 4. 11. E. 4. 16. Co. lib. 9. f. 87. b.

Nota. br. 231. a. He muſt have a *liberate* alſo.

27. H. 6. 4. b. 1. H. 7. 17. 2 H. 7 8. 9. Clarke of the Hamper. 10. H. 6. 24. 25.

So if any Lord of free Tenants, doth levy ayde of them for the marriage of his eldeſt Daughter, and he dye before ſhe be married, ſhe may recover this money by an action of debt againſt his Executor, but this is by ver-

Nota. br. 83 84. Weſtmin. 1. c. 35.

tue of a Statute. There is a president in the Booke of Entries of an Action of debt against the Executor of an Heire, by which it seemes that a man binding himselfe and his Heires, and leaving Assets, the Heire taking the profit, becomes so a debtor, that his Executor shall be charged. And in the Register there is a Writ against the Executors of the Guardian of the Spiritualties of the Arch-Bishop of *Yorke*, for the debt of *B.* who dyed Intestate, and whose Goods came to the hands of the said Guardian, *viz.* the Deane of *Yorke*. In allowance whereof there is a note added of the like Writ, brought in K. *R.* 2. his time, and that then a president was alledged of such a Writ in King *Ed.* 2. his time, against the Executors of an Ordinary, and that they were inforced to answer unto it. So is the opinion of *Trew*, in the time of *Edward* the third. But *Ald.* opposeth him. Also the *Rationabile parte bonorum* by custome in some places is maintaineable for the Wife and Children, against the Executor. But no action of account lyeth against Executors, except for the King. More hereof, tit. wrong.

Lib. Intr. 172. b.

Reg. orig. 141. a.

11. R. 2. 16. E. 2.

11. E. 3. Fitz. Ex. 77.

See Co. lib. Intr. 564. Such an action in Yorkeshire,

Of Covenants charging Executors.

VVE have already touched upon Covenants in part, *viz.* where they be expressely for payment of money, shewing them

to

to bē in Law bonds, that is, Writings Obligatory, whereupon an action of debt may be brought, as well as an Action of Covenant, though the words of the Deed beare the sound and phrase of a Covenant. Yet in some Cases no action of debt lyeth upon a Covenant to pay money: as if *A.* Covenant, that his Executor shall within a yeare, or such a time after his death, pay ten pound to *B.* now for that no action of debt was maintaineable against *A.* himselfe, it lyeth not against his Executor, but onely an action of Covenant, as was held in the late Queenes time. So if the Covenant be conditionall, as thus, that if *C.* doe not pay to *B.* ten pound, then *A.* will pay it, and so also perhaps, if the Covenant be in the distinctive, *viz.* to doe such an act or to pay ten pound, now if the act be not done, yet no action of debt lyeth for the money, but onely an action of Covenant. But now let us come to the Cases of meere Covenants, and see which of them will charge an Executor, and which not. If a Lessee for yeares covenants to repaire the buildings, or to pay the Quit-rents, issuing out of the Land let, there is little doubt, but the Executor to whom the terme commeth, must as well as his Testator, performe that Covenant, although he did not covenant for him and his Executors, and yet of these cases doubt hath beene.

Iure Andrewes & Elsrigge corcore, 33. Eliz.

Pas. 33. Eliz. inter Bor. & Austin. in com. ba.

Quare, if both be to be done by the covenanter *viz.* ten pound if not five such a day. So in *Penots* Case.

But where the Lessor did Covenant to pay the quit-rent, Divers Iustices thought the Executor, not named was not bound. 1. & 2. *P. & M. D.* 114.

beene, and touching the latter, *viz.* of paying Quit-rents, divers Juſtices in Queene *Maries* time were of opinion that it was a thing ſo perſonall that it dyed with the perſon and did not charge the Executors; Nor is there any contrary opinion expreſſed in the Booke. And ſince that time, *viz.* towards the end of Queene *Elizabeths* raigne, in the Action of Covenant betweene the Deane and Canons of *Windſor*, and *Hide*, touching reparations, at the firſt, much opinion was, that onely the perſon Covenanting was tyed to this performance, but after it was reſolved, that that Covenant did runne with the eſtate, and ſo both Executor and Aſſignee bound to performance; but in that caſe it was ſaid by *Popham* Chiefe Juſtice, that if the Covenant had beene to doe a Collatterall act, neither the Executor nor the Aſſignee had beene tyed thereby, and therefore where a Leſſee for yeares covenants within ſuch a time to build a new houſe upon the Land, and dyes before that time expired, I doubt whether the Executor be bound to performe this, or not; although it doe concerne the Land let, ſo as perhaps the Rent or Fine was the leſſe, in reſpect of this charge of new ſtructure or building, which is a great reaſon that the Executor, though not named ſhould be tyed to the performance: But if the Covenant had been to build a houſe elſewhere then

Note the Caſe is *ut ſupra* in marg.

Paſ. 38. *Eliz.* in *Ba. reg.*

Co. lib. 5 *ſ.* 24.

Reſolved P. 39. *Eliz.* But not adjudged till *M.* 43. & 44. *Eliz.*

then upon the Land let, or to doe any other collaterall thing, not pertinent to the Land let, it is cleere the Executors were named to performe it: and yet in those cases, if there were a breach, or non-performance in the Testators life time, as that the time of performance were expired before his death, then it is cleere the Executors were bound to yeeld recompence by way of dammages recoverable, in an action of Covenant, as both *Shelley* and *Fitzherbert* agreed, and so also did the Lord *Popham* agree in the said case of *Hide*, as I find in my owne report of that Case, though in the Lord *Cooke* reporting onely the point in question that be not mentioned; Now let us consider of the case, where there is no expresse Covenant at al, so much as for the Lessor himselfe, but onely a Covenant implyed, or Covenant in Law, as we call it. As if Lessee for life, make a Lease for yeares, and dye within the terme, so as the Lessee is evicted by him in reversion, or remainder. In this case it was resolved in the late Queenes time, by three Justices *viz*, *Walsh*, *Browne*, and *Dyer*, that by this Covenant in Law, the Executors were not chargeable, and in the same case the Lord *Dyer* sets downe another resolution after, to the same effect, but Master Serjeant *Bendloes* reporting this latter case to be of a Lease made by Tenant in tayle, *viz*. before the Statute

Tr. 28. H. 8. Dy. 14. There the house was to be built upon the Land leased and yet *Baldw.* seemed of a contrary opinion.

M. 8. & 9. El. Dy. 257. Intrat. M. 7. & 8. Eliz. rot. 1137. Swanne vers. Strangsham & Samler.

of 32. *Henry* 8. or not warrantable by it, sets downe the opinion contrarily, *viz.* that the action was mainetaineable against the Executor. This may serve for instance, the like being in any other case, where the Lessor hath not a good, and a firme title, but perhaps subject to a Condition or other eviction, so as the Lessee cannot injoy the Land according to his Lease. But this must be so understood, that no eviction, or breach of Covenant, is in the life of the Testator himselfe, for if that be, there is no question, but the Executor stands chargeable; and therefore if one make a Lease of Land by Deed, wherein he hath nothing; this Covenant is perhaps presently broken, and though the Lessor dye before an action of Covenant brought, it will be mainetaineable against his Executor, though no expresse Covenant. This is usefull to be knowne, though in these dayes there be few Leases so made, without expresse Covenant, and the Executors also named. And where there is a speciall Covenant in expresse words, it doth qualifie the Covenant implyed, so as although Words of demise and grant tye the Lessor to a generall Warranty of the title, against all men, yet it being after covenanted, that the Lessee shall enjoy against the Lessor and his Heires, or against all claiming under him or his Ancestors; Now no eviction by or under any

Tr. 22. Elrot. 459. inter Broderidge & Windsor.

Noke & Anders case.

any other title, giveth cauſe of Action, or bindeth the Leſſor or his Executor, to make recompence.

Of wrongs done by Teſtators, and whether Executors be lyable to amends.

ALthough Executors doe repreſent the perſons of their Teſtators, yet if the Teſtator commit any treſpaſſe upon the Goods of another, or upon his perſon, of Lands no action lyeth for this, againſt the Executor, for *Actio perſonalis moritur cum perſona*; So if a Sheriffe, Jaylor, or keeper of Priſon, ſuffer one in execution for debt or dammages to eſcape, though hereby the party, at whoſe ſuite the Execution was, be intitled to an action, *viz.* an action upon the caſe, againſt ſuch Officer, by the Common Law, and by Statute an action of debt; yet if he ſo ſuffering dye, for that ſuch ſufferance was a wrong of the nature of a treſpaſſe, no action lyeth againſt his Executor for the ſame. And upon the ſame reaſon, as I preſume, if one carry away his Corne, and Hay, without ſetting out the Tenth; although the treble value be recoverable againſt him in an action of debt, yet if he dye before ſuch recovery, the action is gone, and lyeth not againſt his Executor; No not although the Teſtator were a Leſſee for yeares, ſo as his

41. Aſſ. p. 13. 40. E. 3. Fitz. Ex. 74. Co. lib. 9. f. 87. a.

ſtate came to his Executor.

Like Law in other penall Statutes, as for arreſting one at the ſuite of *I. S.* without his privity or aſſent; Or, for not appearing as a Witneſſe, being ſerved with a *ſub pœna*, and having charges tendered and many like; yea, if a Leſſee for yeares commit waſte and dye, no action lyeth againſt the Executor for this waſte; for all theſe caſes are within the rule of *actio perſonalis moritur cum perſona*, and many other like Caſes might be put, but theſe may ſuffice. Yet if a Parſon, Vicar, or other ſpirituall, or Eccleſiaſticall perſon doe ſuffer a ruine or decay of the houſes or buildings upon his ſuch ſpirituall Benefice or promotion and dyeth, his Executors are lyable, by the ſpirituall or Eccleſiaſticall Law, to the ſucceſſors Suite for amends to the repairing of ſuch ſpoyle or decay. And becauſe ſome uſed fraudulently to grant away their Goods, ſo as nothing ſhall be left to their Executors, it was
13. Eliz. cap. 10. enacted *temp. Elizabeth*, that ſuch Grauntees of Goods ſhould be lyable to the ſucceſſors ſuite, for theſe *dilapidations*, as if they were Executors.

As for one other caſe of this nature, *viz.* where an Executor waſteth the Goods of his Teſtator, or an Adminiſtrator the Goods of his Inteſtate, and dyeth. Whether his Executor be ſubject to Action for this or not. I

adjorne

adjorne the reader to that place where I shall treate of such wasting, or devastation by Executors.

Vnto this head, not unfitly may be referred, what before is said of Actions against the Executors of the Debtors Heire, and the Executors of the Ordinary, for the Specialty, binding to payment reacheth not to any of these; but because their Testators should have payed these debts with the Goods or Profits of the Lands of the Debtor, and did not, but retained them to themselves; therefore for this as a wrong, are they suable; as I take it. So also by the same reason are the Executors of an Administrator chargeable, where hee did neither pay the debts, nor leave the goods to the next Administrator, but otherwise disposed of them. Yet an Executor is not chargeable in an action of *Detinue*, nor of account (except to the King) for the Testators detaining, and not paying or answering things received, or under his charge.

Fitzh. Ex. 77.

I conceive no difference betweene this and the other cases, *supra*.

2. H. 4 13. He may by admit. *Co. lib. 11. f. 88. 3. H. 6. 35. Con.* for arrerages of an account before auditors, *11. H. 4. 64. 91, 92. 9. H. 6, 11.*

And the reason why, after account made before Auditors, and the Bayly, or receiver be found in Arrerages and dye, that in this Case his Executor is chargeable, is, because the auditors are made Judges by the Statute, *West. 2. cap. 11.* and so this Arrerage which they have judged, is a debt by Record.

13. Ed. 1.

But if the case be put on the other side, *viz.*

that

that the Bayly, or Receiver, have found in ſurpluſſage upon his Account, *viz.* that he hath laid out more in his Lords or Maſters buſineſſe, then his receipts amounted unto, and then his Lord or Maſter dyeth, now ſhall not he have any action againſt the Executors, for the ſurpluſſage, becauſe it is out of the purview of the ſaid Statute.

Co. lib. 9. f. 87. a.

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Chap. XII.

Of the Order and method to be uſed by Executors in paiment of Debts, and Legacies, ſo as to eſcape a devaſtation or charging of their owne goods.

WE have gone through and diſpatched the two firſt propoſed parts, *viz.* 1. Touching the being of Executors, and the manner of their being. 2. Their having, and the manner of their having. We come now to the third part, *viz.* their doing or diſpoſing of the teſtators eſtate.

Now this conſiſts principally in the iſſuing of money, though partly alſo in delivering or aſſenting to the execution of Legacies, not being mony, but other goods or chattels bequeathed.

Money is to be iſſued by executors, foure wayes ordinarily.

About the funerall of the teſtator.

About proving his Will.

In paying of debts.

In paying and ſatisfying of legacies pecuniary.

As for the firſt, burials be as of neceſſity for two reſpects, *viz.* 1. Of charity to the dead, that hee may be Chriſtianly and ſeemely interred. 2. To prevent and avoide annoyance to the living, who by the very view of dead carkaſes, would both be affrighted, and within a few dayes diſtaſted at the noſe. We know that under the Law, the touching

of a dead carkaſe made a man uncleane and to need purifying: nor can we eaſily forget what the ſiſters of *Lazarus* ſaid to our Saviour touching their brother, when hee had beene dead two or three dayes: *viz.* that the taking of him then out of his grave muſt needs bring a noyſome ſavour. Hereabout therefore ſome expence is neceſſary, and that not only for fees to be paid, which in *London* amounts to a conſiderable ſumme, ſpecially for ſuch as are to be buried within the Church, but alſo otherwiſe, *viz.* for the Pall or Hearſe-cloath, the ringing, &c. As for feaſting, and banqueting, it ſeemes not to me congruent to the ſadneſſe and dolefulneſſe of the action in hand. But howſoever that be yet where the teſtator leaves not ſufficient goods to pay his debts, feſtivall expence is to bee forborn, except the Executor will out of kindneſſe beare it with his own purſe; for dead debtors muſt not feaſt to make their living creditors faſt. I mētioned a cōſiderable amount of funeral fees payable in *London*, and ſurely (to let my thoughts fall back upon it a little) it is worth conſideration, whether in that kinde, and eſpecially for thoſe who dying there, are yet carried into their countries to be buried, the exaction be not either unjuſt altogether, or too oneroufly exceſſive, ſo alſo for much ringing contrary to the Canon made at the Convocation in the firſt yeare of King *James*.

The next thing mentioned to juſtifie and occaſion expence, is the proving of the Will: But this way a greater diſburſement (except for riding charges, or by reaſon of oppoſition by a caveat put

in

in or the like) will not ſtand allowable then is preſcribed by the Statute made in the time of *Hen.* 8. whereby the fees of Ordinaries, and their Scribes, Regiſters, and Officers be limited. And it is ſtrange that theſe bounds have b:ene ſo much and ſo frequently broken and tranſgreſſed, the rather, for that long before in the time of King *Edward* the third, by an Act of Parliament, it is provided that the Kings Juſtices ſhould as well at the Kings ſuit, as at the parties grieved, enquire after ſuch oppreſſions, or extortions, for ſo they be called; yea S. *Germ.* who was no ſtranger to the civill and canon law, as appeares by his book, ſaith that the Ordinary ought to take nothing for the probate, if the goods ſuffice not for funerall and debts; but hee meanes only that conſcience is againſt it.

21. Hen. 8. cap. 5.

25. Ed. 3. cap. 4.

Do. & Stu. li. 1. cap. 10.

Now we come to the third occaſion of disburſment, *viz.* paiment of debts, which is the maine part of our buſineſſe. We have before ſeene what debts lye upon executors, having aſſets to pay them; we are now to ſee in what order they muſt pay them, as well *Vt ſint fidi diſpenſatores*; as for their owne indempnity, *ne quid res ſua capiat detrimenti.* To put our ſelves into the better order or method of handling theſe things, we will ſort out debts into their ſeverall kinds thus.

They are of theſe three ſorts, *viz.* either,

Debts of or upon record.

Or debts by ſpecialty.

Or debts without ſpecialty.

The debts upon record may be againe divided into foure ſorts or kindes, *viz.*

Debts to the King or the Crowne,
Debts by judgement or recovery in ſome court of record.
Debts by recognizance.
Debts by ſtatute ſtaple, or ſtatute merchant.

Amidſt theſe, the debts to the Crowne are to have the firſt place or precedence, ſo as if there be not come to the executor goods of greater valew then will ſuffice for the ſatisfaction of theſe, he is not to pay any debt to a ſubject, and if he be ſued for any ſuch, he may pleade in Barre of this ſuit that his teſtator died thus much indebted to the King, ſhewing how, &c. and that he hath not goods ſurmounting the value of that debt. Or if the ſubjects purſuit be not ſo by way of action, as that the executor hath day in Court to pleade, but be by way of ſuing execution, as upon ſtatute marchant, or ſtaple, then is the executor put to his *audita querela* wherein he muſt ſet forth this matter. And there is great reaſon why the Kings debts ſhould thus be preferred before any ſubjects, *viz.* for that the treaſure Royall is not only for ſuſtentation & maintaining of the Kings houſehold, but alſo for publick ſervices, as the warres, &c. as appeares by the ſtatute, 10. *Rich.* 2. *cap.* 1. And therefore it is as I conceive, that *Bracton* ſaith of the treaſures or revenues Royall, *Roborant coronam* they doe ſtrengthen or uphold the Crowne. And for the like reaſon as I think, did God inact touching the poſſeſſions of the Crown, that if they were given to any other then the Kings owne Children, they ſhould revert and come back to the Crowne

M. 33. & 34. Eliz. the Lady Walſinghams caſe in com. ba. & Tr. 39. Eliz.

Lib. 1.

Crowne the next Jubilee, which was once in fifty yeares, *ſed de hoc ſatis*. But this priority of paiment of the Kings debt before the debt of any ſubject, is to be underſtood onely of debts by or upon record due to the King, and not of other debts. If any ask how the King ſhould have any debts which ſhall not be of record, ſince by the ſtatute 33. of King *Hen.* 8. *cap.* 39. it is inacted that all Obligations and ſpecialties taken to the uſe of the King ſhall be of the ſame nature as a ſtatute ſtaple: To this I anſwer, that there may be ſummes of money due to the King upon woodſales or ſales of Tinne, or other his minerals, for which no ſpecialty is given; ſo alſo of amerſements in his Courts Baron, or Courts of his Honours, which be not Courts of record: The like of fines for coppyhold ſtates there. So of the money for which ſtraies within the Kings Mannors or liberties are ſold. Alſo as the law hath lately beene taken and ruled in the Exchequer, even debts by contract due to any ſubject, are by his outlawry or attainder forfeitable to the Crowne. Yet neither theſe nor thoſe due to ſuch perſon outlawed or attainted by bond, bill, or for arrerage of rent upon leaſe is or can be any debt of record untill office thereupon found; for although the outlawry or attainder be upon record, yet doth it not appeare by any record before office found that any ſuch debt was due to the perſon outlawed or attainted. Thus are not theſe debts to the Crowne to have priority of payment before the ſubjects debts, though the Kings debts of record are ſo to have; ſo that if a ſubject to whom

21. E. 4. 21, 22. So muſt it bee pleaded, M. 33. & 34. Eliz.

whom the teſtator was indebted by ſpecialty ſue for this debt, the executor muſt pleade that the teſtator dyed indebted thus much to the King by record, more then which he left not goode to ſatiſfie; if the truth of the caſe ſo be, for if there be ſufficient to ſatisfie both, then the ſubject creditor is not to ſtay for his debt till the Kings debt be levied. And if the ſubject creditor ſue execution upon a ſtatute, ſo that the executor hath no day in Court to pleade this debt to the King, then is the executor put to an *audita querela*, wherein he muſt ſet forth that matter, and ſo provide for his owne indemnity. But what ſhall we ſay of arrerages of rent due to the King? ſurely where it is a feefarme, rent, or other rent of inheritance, I ſee not how it can come under the title of debt, ſince for it no action of debt is maintainable ſo long as the ſtate continueth in him to whom it grew due, and I find that the *Lo. Dyar, M.* 14. *Eliz.* ſaid that the King could but onely diſtraine for his rents, and not otherwiſe levie them of lands or goods; and that the King by his Prerogative may diſtraine in any other lands of his tenant our bookes tell us, but no more. Yet I know it hath beene otherwiſe done of late in the Exchequer, which if it have beene the ancient and frequent uſe of the Exchequer, it will ſtand as law though unknowne to the *Lo. Dyar.* Now rent upon a leaſe for yeares differeth from the other, ſince for the arrerages thereof an action of debt lyeth, but how can either of theſe be debts of record, when the not payment may be either in the Court of Exchequer, or to the receiver generall or particular?

And muſt plead the record in certain as was held in the caſe of the Lady Walſingham, M. 33. & 34. Eliz. but it ſufficeth to ſay, by a record of the Exchequer as was held Tr. 39. Eliz. in b. reg.

particular? & how then can there be any certain record of the not payment, ſo as to make any certain debt upon record? Wee know ſtatutes have beene made to make the lands of receivers ſubject to ſale for ſatisfaction to the Crown; and beſides that ſome ancient Patents direct the payment of Fee-farmes into the hands of Sheriffes, the ſtatute of Weſtm. 1. cap. 19. provides remedy for the King againſt Sheriffes not anſwering the debts of the Crown by them received: ſo as the Kings Farmer or debtor may have paid his rent or other debt, and the Crowne have not yet received it. Of Fines and amercements in the Kings Courts of Record, there is no doubt but they are debts of record.

Come we now to the debts of ſubjects, and firſt thoſe of record, touching which, I ſhall not be able to hold ſo good a method, and ſo well to handle things by parts as I would, for that the parts ſo ſtand in competition one with another for precedencie, as that they muſt of neceſſity thereabout conflict and interplead one with the other, and conteſt one againſt the other: yet for the Readers better eaſe and ability to finde out that which may concerne him in his particular caſe, I will in the beſt ſort I can ſingle out theſe things into ſeverall parts, and place them in ſeverall roomes or ſtations. Firſt, conſidering how it ſhall ſtand between one judgement and another had either againſt the executor or teſtator. Secondly, how betweene judgements and ſtatutes, or recognizances. Thirdly, how betweene recognizances and ſtatutes. Fourthly, how betweene one recognizance and another.

another. Fifthly, how betweene one ſtatute and another, adding to each ſome obſervations incident.

Now next to the debts of the Crown are judgements or debts recovered againſt the teſtator, to have priority or precedencie in payment, as being of an higher nature, or more dignity than any other, for that ſtatutes and recognizances, though they make debts upon record, yet are they begotten but by voluntary conſent of parties, whereas in every judgement there hath beene a courſe and work of Juſtice againſt the will of the defendant, as is preſumed; and this in a court of juſtice, and the records of ſuch judgements are entred in publike rolls, not kept or carried in pockets or boxes as ſtatutes, and untill inrolment recognizances are. Therefore executors muſt take heed that judgements againſt their teſtators before debts any other way, if they have not ſufficient for both, be firſt ſatisfied: leſt they draw the burthen of this debt upon their owne backs. Now their way to help themſelves being ſued, or purſued for other debts, is the ſame before delivered touching debts upon record to the Crowne, *viz.* by plea, where they may plead, as in *Scire facias*, upon a recognizance or ſuit upon band; and by *Audita querela*, where they cannot plead, as when execution is ſued upon a ſtatute. And if they had no warning in the *Scire facias*, but upon *nihil* returned the judgement paſſed, there alſo the executor may bee releeved by *audita querela*, becauſe there was no default in him that hee did not plead or ſet forth the judgement upon

Co. lib. 5. f. 28. So Wray and Gaudy inter Bond & Bales 28. Eliz. vel citer.

Yea though a writ of Error by the executor to reverſe the judgement yet ſuffering a ſtatute to bee executed, muſt pay of his own. Read & Bearblocks caſe. P. 43. Eliz. Ba. re. So held in Reades caſe ſupra. vide 12. H. 7. Kelw 24 25. to like purpoſe.

upon the ſuit in the *Scire facias*. Nor will it bee any plea for the creditor by ſtatute to ſay that his ſtatute was acknowledged before the judgement, and ſo is more ancient, for a latter or more puiſne judgement is to bee preferred before a ſtatute in time precedent. But if this judgement be ſatisfied, and it only kept on foot to wrong other creditors, or if there be any defeaſance of the judgement yet in force, then the judgement wil not availe to keep off other creditors from their debts: And thus much touching debts by judgement, *viz.* how they ſtand in priority before other debts by ſtatute or recognizance. Now to ſee how they ſtand among themſelves, let this be obſerved, *viz.* that between one judgement and another had againſt the teſtator, precedencie or priority of time is not materiall, but he which firſt ſueth execution muſt be preferred, and before any execution ſued, it is at the election of the executor to pay whom he will firſt; yea, if each bring a *Scire facias* upon his judgement, the executor may yet confeſſe the action, of which he will firſt, notwithſtanding the *Scire facias* was brought by the one before the other. In this *Scire facias* the defendant may plead generally that he hath fully adminiſtred before the *Scire facias* brought without ſhewing that he did adminiſter in payment of debts of as high nature; yet that muſt be proved upon the evidence, elſe the triall will fall out againſt the executor. Thus have I delivered the moſt materiall things in my apprehenſion touching debts by judgement; yet thereabout I will adde for the better information of the

Co. lib. 4. f. 59. So Periam in com. ba. inter Charnock and Worſley. 34. Eliz. rot. circiter.

Co. lib. 5. f. 28. Co. li. 8. f. 132.

So held in 15. & 16. Eliz.

So in the *Scire fac.* by bond againſt Bales it was held.

Co.lib 5.f.28. So if surrend. though not discharged.

membred, as good matter both against statutes and recognizances, and that whether the recognizance have a defeasance or a condition not broken, so that the recognizance is not forfeited. In none of these cases is the executor hindred frō payment of debts by specialty, nor can he be justified or excused if by colourt hereof he refuse so to do; and indeed else might creditors be exceedingly defrauded by recognizances for the peace and of good behaviour, &c. and so by statutes for performing covenants touching the enjoying of lands, if these should keepe off the payment of debts, and yet themselves perhaps never bee forfeited, nor the summes become payable.

Of Debts by specialty.

NOw come wee to debts due by specialty, *viz.* bond or bill (of which nature the greatest number of debts are) let us then see what course the executor must or may hold for satisfaction of these, admitting that the testator stood not indebted by any record, or that no forfeiture is of any such debt, or that there be goods in the executors hands above the amount of such debts by record. This I say *dato*, then according to the rule *proximus quisque sibi*, the executor may first satisfie himselfe of such debts, as the testator by specialty owed him: for such debts are not released by the creditors taking upon him to be executor to the debtor; though on the

other

other ſide if the creditor make his debtor executor, this is a releaſe of the debt. Although it be given out or commonly ſpoken in the generall, that an executor may firſt pay himſelfe, yet is it to be underſtood with this caution or condition, *viz.* that the debt to him be of equall height or dignity with the debts to others according to the rule *inæquali jure melior eſt conditio poſſidentis*, for if his teſtator were indebted to other men by any ſtatute, judgement, or recognizance, and to him whom he maketh executor only by bond, or other ſpecialty, then may he not firſt pay himſelfe, that is, by paying of himſelfe leave them unpaid whoſe debts are of a higher nature; but if there bee ſufficient for ſatisfaction both to them and himſelfe, then is it not materiall which be firſt paid. Now touching the debts to other men the executor hath power to give preferment in paiment to whom he will; ſo that if the teſtator left but an hundred pounds, being indebted to *A* an hundred pounds, and to *B* an hundred pounds by ſeverall obligations, the executor hath power to pay *B*. his whole debt, and to leave *A* altogether unpaid any part of his debt, ſo as he have not commenſed any ſuit before paiment to *B*. But yet herein this difference is to be taken and obſerved by executors, that if the time of paiment upon the bond of *B* were not come at the time of the teſtators death, then may not the executors before the money to *B* become payable pay him and leave *A* unpaid whoſe money was preſently due. Yet if *A* forbeare

28.H.8.Dy.32. Doct. & St. ca. 16.p.78.

perly records, but obligations recorded; yet do I not find that this makes a difference for priority of payment. And indeed the ſtatute is the more expedite remedie, ſince thereupon execution may be taken out without any *Scire facias*, or other ſuit, which cannot be in the caſe of a recogniſance; for there if a yeare be paſt after the acknowledgement, no execution can be ſued out againſt the partie himſelfe acknowledging it, without a *Scire facias* firſt ſued out againſt him: And if he be dead, then though the yeare be not paſt, yet muſt a *Scire facias* be ſued, and thereupon the executor defendant may plead ſome plea to hold off the execution for a time. But this notwithſtanding, the executor may ſatisfie the recognizance before the ſtatute, at leaſt if he dõe it before execution ſued thereupon; for they ſtanding in equall degree, it is at his election to give precedencie and preferment to whether he will. Neither is it materiall which of them were firſt or more ancient; nor between one ſtatute & another doth the time or antiquity give any advantage as touching the goods, though as touching the lands of the conuſor it doth; but as for his goods in the hands of his executor, whoſoever firſt getteth hold of them by his execution ſhall have the preferment. And before ſuing of execution, the executor may give precedence or preferment to whom he will. But now ſome may object that there is no courſe nor writ of execution for any ſuch couniſee againſt the executor, and if ſo, then ſtatutes merchant, and of the ſtaple, are

Before *Sci. fac.* not after voluntarily, but if levied by writ of *Extend. fa.* good.

are in vaine ſpoken of, and it is true that Maſter *Brook* after Chiefe Juſtice of the Common Pleas in his new Caſes profeſſeth, that he knew not any remedy for the creditor out of the goods of the conuſor after his death. But if this ſhould be ſo, the Law were very defective, ſince the ſubſtance of many, eſpecially of marchants, for and among whom the ſtatute marchant was provided, conſiſteth uſually more in goods then lands; beſides the plea of Harriſon, adminiſtrator of the goods of Sidney in barre of Greenes action of debt upon an obligation, *viz.* that the inteſtate ſtood bound in a ſtatute ſtaple to I. S. and Greenes reply thereunto, that there were Indentures of defeaſance, no covenant whereof was broken, and the reſolution of the Judges that the ſaid matter in the replication was good to avoid the defendants plea. All this, I ſay, and the reſolution of the Judges of the Common Pleas in that caſe, and in the caſe betweene Pemberton and Barram, as alſo in the Kings Bench by Popham and the reſt of the Judges, that executors muſt ſatisfie judgements before ſtatutes, and ſtatutes before obligations, had beene idle and ſavouring of groſſe ignorance, if no execution at all could be had againſt the executors of him bound in a ſtatute and then ſhould Greene have demurred upon the plea of Harriſon and needed not to have pleaded that other matter, but none of the Judges or Serjeants ever conceited any ſuch matter: that which there was replyed, *viz.* that the ſtatute was not forfeited, is here to bee remembred,

Bee. No. c. 294. & Stat. Mar. 43

Co. l. 5. f 28. b. H. 40. Eliz. rot. 119.

P. 32. Eliz. rot. 235. in cont. ba.

See Co. lib. 5. 91. execution againſt an Exec. upon a ſtatute. Semaines caſe.

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Reader, not ſtudied in the Law, theſe few things. Firſt, that what hath been ſaid is only to be underſtood of judgements againſt the teſtator, and not of any againſt the executor himſelfe, for of thoſe being but debts by ſpecialty at the time of the teſtators death we ſhall ſpeak after. Secondly, what is ſaid of the teſtator in caſe of an executor immediate, is likewiſe to be underſtood of the teſtators teſtator in caſe of the executor of an executor, for where *A.* makes *B.* executor, and *B.* makes *C.* executor, there the goods which came from, or were left by *A.* be not in the hands of *C.* lyable to judgements had againſt *B.* Nor on the otherſide, are the goods of *B.* in the hands of *C.* ſubject to the judgements had againſt *A.* And the like is to be underſtood of ſtatutes, recognizances and bonds, as elſewhere is ſomewhat touched. Thirdly, Recoveries or judgements by meere confeſſion, without defence, are yet of the ſame nature, and to have the ſame reſpect as other recoveries upon triall or otherwiſe; for although they may ſeeme to be but of the nature of recognizances which be *debita recognita*, yet doe they differ from them, in that here a debt is demanded by a declaration which is intended true, & that therefore the defendant cannot deny it, but in caſe of a recognizance it is not ſo, for there uſually no action is entred, nor debt demanded. Fourthly, the foreſhewed reſpect to debts by judgement, is not to be incloſed within Weſtminſter Hall, and be reſtrained to the foure Courts there, but may and muſt extend it ſelfe to judgements in other Courts of Record, *viz.* in Cities and Townes

9. El. 4. 14. 15.

Quæ of arrerages of account before auditors without ſuit, for the executors are charged by judgement of the Auditors, by ſta. W. 2. judg. of record. 10. Fa. 5. 24. 25. Brooke. 183.

Townes Corporate, having power by Charter, or preſcription to hold plea of debt above forty ſhillings, as in London, Oxford, &c. For although there execution cannot bee had of any other goods than ſuch as be within the juriſdiction of that Court, yet if the Record be removed into the Chancery by *Certiorari*, and thence by *Mittimus* into one of the Benches, ſo execution may be had upon any goods in any County of England. Fifthly, in caſe where the teſtator was bound in a recognizance and a *Sci. fac.* brought againſt him, and thereupon judgement given; Although this judgement be not *quod recuperet* as in caſe of actions of debt, but *quod habeat executionem*, yet ſince execution is the life, fruit, and effect of all judgements, this may now well ſtand for a debt by judgement, as I take it.

Qux. of judgement in a writ of Annuity for arrerages after.

Of Recognizances and Statutes.

NExt unto debts by judgement, are thoſe by ſtatute or recognizance to bee regarded by the executor. And becauſe I find no difference of priority or precedencie betweene theſe two, I therefore ranke them together; yet one reaſon of preferment given to judgments before ſtatutes in *Hariſons* caſe, *viz.* that the one remains a record upon the roll in the Kings court, whereas the other being carried in the pocket of the couniſee is more private. This, I ſay, ſhould give priority alſo to recognizances before ſtatutes, as alſo another reaſon, for that ſtatutes are not pro-

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beare to demand or sue for his debt till the debt of *B* become also payable, then is it at the will of the executor to pay whether of them he will, so as the other may lose his whole debt if the goods will not suffice to pay both. What if *A* have only by word demanded his debt, and not by suit before the debt to *B* become payable, whether doth that hinder that the executor may not now when the money to *B* is also payable, pay him and leave *A* unpaid. And hereunto S. *Germ.* answereth negatively, making this verball demand to be idle and of no value: yea, he addeth that if *A* have commenced suit before the debt to *B* become payable, yet if the executor can delay the suit till the debt of *B* become payable, so that *A* can get no judgement before that time, and before *B* hath commenced suit upon his band, then may the executor confesse his action, and so pay his debt leaving *A* unpaid. But of this I make some doubt, for that I finde in 9 of King *Ed.* the 4. some admittance, that if *A* having a Tallie, patent, or other warrant from the King for receipt of money, of or from a customer or receiver where others had like warrants before him, but *A* maketh the first demand, now must the officer first pay him or else himselfe shall become debtor to him if he first pay others whose demands were after made, though they had warrants before *A*. Likewise there is as to me it seemes, some admittance in the same book, that the very demand made by a creditor of his debt from an executor, who hath

Do. & St. p. 78.

Qux. If then hee may not pleade this judgement *post ult.* contin. against *A.* as he may pleade it against other suits after cõmenced. Co. li. intr. 148. 269. 149. a.

then

then aſſets in his hands doth intitle the creditor, to recover damages againſt the Executor out of his owne goods; which if it ſo bee, then doth even that verball demand lay ſome tye or obligation upon the executor for payment. But hereabout, I lay downe nothing peremptorily. We partly may diſcerne by the premiſes how the executor is to guide himſelfe in caſe, where there be divers debts by ſpecialty all due, and payable at the teſtators death: before any ſute commenſed for any of them, for in that caſe cleerely the firſt verball demand gives not any precedence, all being due, and ſo ſtanding in equall degree; And this is implyed in many Bookes making the commencement of the ſute onely that which intitles to priority of payment, or at leaſt reſtraines the election of the executor. Yet admit that one creditor firſt doth beginne ſuit, if others alſo after ſue before hee bee payd, or have judgement; now cannot the executor pay him firſt who firſt commenſed ſute, but hee who firſt hath judgement muſt firſt be ſatiſfyed. And the executor may herein yeeld help to one before the other, *viz.* by eſſoignes emplances or dilatory pleas to the one, and by quick confeſſion of the others action; for he is not bound againſt his will to ſtand out in ſute, and expend coſts where the debt is cleere, nor is this covine but lawfull diſcretion, which conſcience will alſo approve ſome good conſideration inducing. Nay after ſute commenſed, yet untill the executor have notice thereof, he may pay any other creditor,

41. E.3.Fitzh. Ex.68.6. & 7. El.dy.232.vide 21.H.7. Kelw. 74.

5.Hen.7.27. So Walmſley inſt.P.39.Eliz. in Error. al. Serieants Inne. Co.lib. Intr. 269.ſuch a recovery by confeſſion is pleaded againſt another and admitted good & fo.148.149. Do.& S.p.78. b.

tor, and then plead that he hath fully administred before notice. Nor is the Sheriffes returne of ſummons or diſtres ſufficient cauſe of notice, for the ſummons might perhaps bee upon his land: but if it were to his perſon, it is notice ſufficient, and then to ſave himſelfe, hee muſt ſay that he was not ſummoned till ſuch a day before which hee had fully adminiſtred; yet doubtleſſe the executor may be arreſted at the creditors ſute in ſome ſort, which yet ſhall bee no ſufficient notice of this debt. As for the purpoſe, if hee bee ſued by *Latitat* out of the Kings bench, this ſuppoſing a treſpas gives no notice of a debt, ſo alſo of a *Subpena* out of the *Exchequer*; but the originall returnable in the common plees expreſſeth the debt, and ſo in ſome ſort doe the proces thereupon. And therefore it ſeemes by ſome bookes, that if it bee laid in the ſame County, where the executor dwels, he muſt take notice of it at his owne perill. But this *I* take not to bee Law, nor is there any great opinion that way: and although to make it more cleere, the executor in King *Henry* the fourth his time, eſtranging himſelfe from notice of the ſute before payment to others, did alledge that the action was layed in a forren Country; that is no great proofe that if his abode had beene in the County, where the action was brought, hee muſt have taken notice; but thus it was cleerer, and a little ſurpluſage hurts not. Now betweene a debt by obligation, and a debt for rent or dammages upon a Covenant broken, *I* conceave no difference nor any priority or precedency,

So alſo was it ſayd Tr. 29. Eliz.

cedency, but it is as the executors diſcretion to pay firſt which he will, as if all were by bond. So alſo of rents behinde and unpaid as *I* conceave, but touching them principally intending rents upon leaſes for yeeres divers conſiderations are to be had, and ſome diſtinctions to be made, as firſt, betweene rent behind at the time of the teſtators death, of which that before ſaid is to bee underſtood, and that which groweth behind after next betweene ſute for the rent by action of debt, and by diſtres and avoury. As to the firſt difference, if the rent grew due ſince the teſtators death, then is it not accounted in Law the teſtators debt, for onely ſo much is in Law accounted aſſets to the executor as the proffits of the leaſe amounted to over and above the rent, ſo as for that rent ſo behind the executor himſelfe ſtands debtor, as hath beene reſolved, and therefore hee is ſuable in the *debet*, and *detinet*, whereas for rent behinde in the teſtators life, and all other the debts of his teſtator hee muſt bee ſued in the *detinet* onely. Hence it muſt follow as it ſeemes, that an executor ſued for debt upon bond, or bill, cannot (except in ſome ſpeciall caſes) pleade a payment or recovery of rent growen due ſince his teſtators death; though of rent behind at the time of his death it bee otherwiſe. And yet heere againe another difference or diſtinction is to bee taken, *viz.* where the proffits of the leaſe exceede the rent, and where the rent is greater then the yeerely value of the proffits, for even there as elſe where is ſhewed, the

executor if hee have affets, is tyed to the holding of the leaſe, and payment of the rent, and conſequently doth ſo much of that rent as exceedes the yeerely profit, ſtand in equall degree, the teſtators debt with other debts by ſpecialty; and yet againe to reconſider this point, what if the debts of the teſtator by ſpecialtie payable preſently at his death, or before the time that any rent can grow due upon this Leaſe, ſhall amount to the full value of the teſtators goods; may not then the Executor though hee doe not pay thoſe debts before the rent day (for that would make the caſe cleere) waive the terme; for if he may, then happilie if he doe not ſo, but ſhall by payment of any of this rent want goods to pay any part of the debts by ſpecialtie, it may lie upon himſelfe, and his owne goods, as happening by his owne default. But on the one ſide it may bee ſaid that hee could not waive it ſo long as hee had affets, becauſe thereby hee ſtood equallie liable to pay that debt being once due, as the other debts by ſpecialty. On the other ſide it may be ſaid that though the debts for rent, and upon bond, ſhall bee admitted to bee in nature equall, yet the caſe being put of rent not due at the time of the teſtators death, it was not then a debt nor duty, whereas a Bond makes a preſent debt, and duty, though not preſently payable, the day of payment being not yet come, ſo as this latter is diſcharged by a releaſe of debts, or duties, and ſo is not the former. So to leave that point unreſolved, let us next ſee whether in

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ſome caſe, though the rent exceede not the yeerely value of the Land, yet even that payable after the death of the teſtator may not ſtand in moſt part, if not wholie, upon the teſtators ſcore as his debt, as well as if it had beene payable before his death. *Poſito* then that the whole or halfe yeeres rent is payable at the annunciation of our *Lady*, and that the teſtator dieth two or three daies or ſome like ſhort time before that feaſt, now certainlie ſhould the Law bee unreaſonable if it ſhould lay this debt upon the executors ſhoulders in reſpect of thoſe few winter daies proffits which he tooke. But ſurely ſince the taking of the proffits inducеth the Law to lay the rent upon the Executor as his owne debt; therefore as where the Executor had the proffits for the whole yeere or halfe yeere, except ſome few daies incurred in the teſtators life time: thoſe few daies will bee unregarded according to the rule, *De minimis non curat lex*, & the whole rent ſhall lie upon the Executor as his owne debt. So on the contrary part, where the whole yeere or halfe yeers proffit except ſome few daies incurred after the teſtators death, the rent becomming payable ſo inſtantlie after the teſtators death muſt in reaſon lie wholy upon the teſtators eſtate, as to me it ſeemes. What if to this I adde that the teſtators cattell wherewith the ground was ſtocked doe depaſture, and devoure the proffits all the time after the teſtators death. till the day of payment of the rents? Nay if

the rent were payable at *Mich.* and the Annunc. and the teſtator dieth a few daies after *Mich.* the rent being of or neere the value of the Land, it will then bee hard that the Executor ſhall for this winter proffit pay the rent out of his owne purſe, eſpeciallie if the whole yeeres rent bee payable at that one day as in ſome caſes it is; or if the whole yeeres proffits were taken in the ſummer as in caſe of a leaſe of tithes, it is ſo alſo of medow grounds uſually drowned in the winter. So if the leaſe bee then to end not having a ſummer halfe yeere to ſucceede, and make amends for the winter: or if the winter halfe yeere bee the latter halfe, the leaſe beginning at *Lady* day, ſo that there is but a ſummer for each winter following, and not any for the winter paſſed. Of like conſideration with theſe is the caſe of a leaſe of woods for a rent, which being fellable but once in eight or nyne yeeres; now if the leſſee, having made the laſt ſale and felling before his death, the Law ſhould caſt the rent upon the Executors owne eſtate for the time future, it ſhould lay loſſe upon him, which is againſt reaſon, and contrary to the nature, and diſpoſition of the Law even in this particular. As appeares by this, that ſhee enables an Executor to pay himſelfe before any debt of equall nature, ſo as ſhee more tenders an Executors indempnity then any other Creditors; therefore I thinke that with, and upon the differences above ſhewed, even rent growen due after the teſtators

death

death may in ſome caſes bee the teſtators debt payable equally with debts by bond. But here I conceive that if the executor were in ſuch caſe of deſtitution of aſſets as might juſtifie his waiving of a leaſe over-rented, hee then may waive theſe termes reſidue, becauſe for the future the profits will come ſhort of anſwering the rent, though at the firſt, and ſo in the totall, the profits did exceed the rent. And if for want of waiving, where he might, this rent fall upon him, the paiment thereof would be no excuſe againſt another creditor, nor as to him be a good adminiſtration, for *Ignorantia juris non excuſat*. This is pertinent to our preſent conſideration, which debt may with ſafety be paid, leaving another unpaid; and the hazard of executors, by ignorance of the Law hath been a principall motive to my writing theſe Diſcourſes in Engliſh. Hitherto we have only conſidered, as I think, of rents, as they be recoverable by action of debt. Now let us ſee if there may not be ſomewhat different conſiderations touching diſtraining for rent, and ſo comming to recover it by avowrie. Put wee then the caſe that an executor hath fully adminiſtred in payment of debts by bond, and after the leſſor or revertioner commeth and diſtraineth for arrerages of rent due in the teſtators life; can the executor in bar of the avowrie plead fully adminiſtred, as hee might have done if an action of debt had been brought for theſe arrerages? doubtleſſe I think no, nothing

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ſhall hinder the levying of the rent upon the land ſo long as it is enjoyed under the title of the leaſe, except the land come to the King, upon whoſe poſſeſſion no diſtreſſe can be taken: I think therefore that the executor who paid out of his own purſe to the value of this leaſe (for ſo I intend the caſe, and elſe could he not have fully adminiſtred, as in the caſe was put) he ſhould, I ſay, have abated in the price and valuation of the leaſe, as well the arrerages of rent, as the rent futurely payable, both being equally leviable upon the land, and if he ſo have done, he is no loſer by payment of this arrerage: but if truſting to the power of an executor, and to the plea of fully adminiſtred hee did not ſo, but disburſed in reſpect of the leaſe to the full value without ſuch abatement, he muſt beare the loſſe of his owne ignorance. He might alſo another way have helped himſelfe, *viz.* by payment of that arrerage, leaving other debts by ſpecialty unpaid. And what if ſuits were preſently commenſed upon the teſtators death before hee could make payment of the rent behind, whether might the executor then plead this debt for rent, as hee might a debt by judgement or ſtatute, and ſurely me thinkes it probable that he might, becauſe it is a debt from which hee cannot be freed by payment of the other debts ſued for by ſpecialtie. If the revertioner would alſo commence ſuit before judgement had for the creditor by ſpecialty, then might the executor

cutor helpe himſelfe by confeſſing his action firſt; but this perhaps the revertioner would not conceive ſafe for him, ſince that way the others might get judgement before him, and ſo he might loſe both his ſuit and his debt, whereas holding himſelfe to the courſe of diſtres, the leaſe continuing, he hath land at the ſtake, for his debt. What if he diſtraine and avow? may not now the executor pay him, or at leaſt confeſſe his action or avowry, ſo as he firſt having judgement, may firſt be ſatisfied. Surely after ſuite commenced, I ſee not how the creditors by bond can ſo be prevented, at leaſt without judgement had for the rent; yea, though ſuch a judgement be had, yet becauſe the judgment in that caſe is not that hee ſhall recover the ſumme due for rent, but only that he ſhal have a returne to the pound of the cattell diſtrained for the rent, it is queſtionable whether the paiment thereupon of the rent ſhall prevent the judgements after had in the ſuits upon bonds. But I thinke it ſhall, becauſe although it bee not an expreſſe recovery of the rent, yet is it ſuch a judgement compulſary for the ſame, as makes the payment inevitable and of neceſſitie. And where before we have made the queſtion only between the ſaid rent-debt, and the debt by obligation: let us now put the caſe between the rent-debt and the debt by ſtatute or judgement. If then the leſſor after death of the leſſee diſtraine for the rent behind part of the teſtators cattell, and after there comes a

writ of execution upon a judgement or ſtatute of the teſtators; whether ſhall theſe beaſts in the pound for rent be delivered in executiō or not, admitting that without them there be not goods ſufficient for ſatisfaction of the judgement or ſtatute. And ſurely I thinke they cannot be delivered in execution: Firſt, for that they are in the cuſtody of the law, as in *Stringfellowes* caſe, though there the Kings prerogatime overtopped that point; yea, ſo I thinke, though they be replevied, for that they are to be returned to the pound, if judgement paſſe for the avowant, to which purpoſe ſecuritie is given, ſo as they are but in the caſe of a priſoner bailed, who ſtill is in ſome ſort in cuſtodie. Secondly, for that this rent incident to, and deſcendible with the reverſion, breeds a debt of a freall nature, and ſo of more dignity and worth than debts perſonall. Thirdly, for that the land let (as in a ſort debtor) ſtands chargeable with this diſtres from the very time of making the leaſe, as either by a contract real of *quid pro quo*, or rather by an operation of law or legall conſtitution, or ancient cuſtome of the Realme, without any contract of perſons. Laſtly, for that the leſſor doth not diſtraine the cattell therefore, or in that reſpect for that they are or were the goods of the teſtator, but for that hee found them levant and couchant upon the land, which muſt afford his rent, or a diſtreſſe for it if behinde, ſo as if they had beene any under tenants or ſtrangers Cattell, they

See 13. R. 2. Bro. Pledges 31. Attainder of the party diſtraind ſhall not take away the diſtres. Vide Dyer.

they might have beene diſtrained. Some may perhaps object this reaſon why theſe impounded cattell ſhould be delivered in execution, *viz.* for that where otherwiſe the creditor by ſtatute or judgement ſhould loſe all or part of his debt, yet by this releeſe done to him ſhall not the leſſor loſe his rent, for that he may at any time after diſtraine any goods or cattell found upon the ground at any time during the continuance of the leaſe. But here beſides the point of delay and ſtay for this rent, which to many is the ſole meanes of maintaining their houſeholds and families; this further is conſiderable, that perhaps the leaſe may be neere expiring, perhaps ſo highly racked and rented, even to or above the value, as that the executor having his teſtators ſtock taken from it and him by execution will not ſtock it any more, and ſo the land lying freſh, if the leſſor ſhall loſe the benefit of his former diſtres, he ſhall be perhaps without remedy for his arrerages of rent. And if the caſe were of a diſtres for rent behind after the teſtators death, I conceive though not ſo ſtrongly, for moſt of the reaſons aboveſaid, that the law would be all one as in the other caſe; for though in this caſe reſpect ſhall not be had to the executors loſſe upon whoſe goods the law caſts this debt, though not the other, yet here the point of loſſe muſt fall either upon the leſſor loſing his diſtreſſe, or upon the other creditor by ſpecialty or record loſing wholly or in part his

debt. And in reſpect of this locall tye upon this land for paiment of the rent whereto even the fealty of the leſſee and tenure of the land bindeth him, and it I think no act that the leſſee can do by entring into bonds or ſtatutes, or having judgements againſt him can hinder the leſſor or reverſioner from taking his remedy upon this leaſed land for the rent therefore due, but rather any other creditor ſhall be a loſer in his debt. Doubtleſſe if in barre to the avowrie for this rent due either before or ſince the teſtators death, the executor will plead that the teſtator was indebted a thouſand pounds, by ſtatute, recognizance, or judgement, which is more then all his goods amounted unto, it will be no good plea, but may be demurred upon. What if hee plead ſo much debt of record to the Crowne? ſurely I doubt whether this plea will be allowed in any other Court then the Exchequer; yet if theſe arrerages of rent ſhall be levied upon the land, ſo as either the executor muſt pay it or loſe the cattell diſtrained by a returne irrepleviſable, and then ſhall not have ſufficient to ſatisfie the debt to the Crown, I ſee not how he ſhall well eſcape, when purſued in the Exchequer to make up this Crowne debt out of his owne purſe, which is hard. For this we may pitch upon as a *Maxime* and principle, that an executor where no default is in him, ſhall not be bound to pay more for his teſtator then his goods amount unto. Againe, it is a rule, that where nothing

Vid. Bro. Pledg. 31.

nothing is to be had, *viz.* juſtly to be had, the King loſeth his right: and our bookes tell us that the Kings Prerogative muſt not do wrong, *Poteſtas ejus juris eſt, non injuriæ: nam poteſtas injuriæ non eſt Dei, ſed diaboli.* So Bracton. On the other ſide it may be ſaid, that if land leaſed come to the King by grant, outlawry, or otherwiſe, the rent reſerved cannot be diſtrained for, and therefore is it not very unreaſonable nor incongruent that the Kings intereſt for his debt ſhould make the diſtres of a ſubject to ſtand by and give place. This therefore among other of the premiſes do I leave as a *quære*: nor is it altogether unprofitable either for an executor or creditor to know what wayes and paſſages, what caſes and contingents be doubtfull and hazardous. And if in theſe unbeaten paths where our bookes and relations have held me forth no light, expreſſe, or particular, I have erred in miſ-reſolving, or miſſing to reſolve, I hope I ſhall without difficulty obtaine pardon. Not reſolving.

Now let us conſider of aſſumptions or promiſes made by the teſtator upon good conſideration, the performance whereof or making recompence and ſatisfaction for not performing, doth lye upon an executor as before is ſhewed. Theſe therefore are to come behinde and give place unto all the former, ſo as an executor this way or for theſe ſued may pleade debts by ſpecialty, rent, &c. amounting to the whole goods. And yet theſe debts by contract

Co.lib.9.fo.88 b. Doct. & Stu. lib.2. cap.10.& 11.

tract or assumption expresse are to be satisfied before legacies be to be had. First, because by the common law of the land those are recoverable, and so are not legacies: next because as our bookes speake, it concernes the soule of the testator to have *æs alienum*, all duties and debts to other men satisfied before the debtors voluntary gifts or bequests. Also these debts by assumption or simple contract, are to be satisfied before the reasonable part of the wife or children, to which by custome in some Counties they are intitled, see 21. *Ed.* 4. 21. & 2 *Ed.* 4. 13. & 2. *Hen.* 6. 16. And note that in such an action upon the case it is not of necessity to lay or set forth in the declaration that the defendant hath assets to pay all debts by specialty, and this also; but if there want, the defendant must alledge that in his excuse, for else it shall be presumed that he hath assets. So also in an action upon the case grounded upon the executors owne assumption to pay his testators debt, and yet as the L. *Cooke* conceives, and upon good reason as to me it seemes, if the executors so promising had not assets sufficient in his hands to pay this debt promised, he pleading *non assumpsit* may give that in evidence, for then the consideration faileth, as also if there were no such debt due, since the plaintife could not have recovered if he had sued, and so his forbearance to sue was no valuable consideration.

Co.l.9.fo.90.b. Pinchons case &.fo.94. Banes case.

Chap.

Chap. XIII.

Of Devaſtation or Waſting.

THat which S. *Paul* of diſpenſers ſpirituall who are as it were the executors of the laſt will and teſtament of our Saviour Chriſt doth ſay or enjoyne, *viz.* that they muſt be found faithfull; The ſame is required of theſe leſſe or inferiour diſpenſers, the executors of mens Wils, and hereof they are to be regardfull, not only in reſpect of eſcaping damage to their owne eſtates, but more eſpecially in reſpect of an oath which divers of our bookes mention to be taken by executors. And in one of the bookes of relations of caſes in the twentieth yeare of *Hen* 7. his time, there is an expreſſion of three things whereto the office of an executor tyeth him. 1. To doe truly, and thereto are they ſworn, ſaith this book. 2. To be diligent, *viz.* with ſedulity to attend the diſcharge of the truſt. 3. To do lawfully; nor well can this latter be without knowledge what is lawfull or required by the law. Now what is formerly ſaid of the right method and order of paiment of debts, diſcovereth in much part how and by what wayes an executor may waſte and miſpend his teſtators goods and conſequently incurre a devaſtation, and ſo make his owne goods liable, but of that

more

more fully and particularly by it selfe, and herein we will consider of these parts.

1. What shall be said to be a wasting or devasting, and how many wayes that may be done.

2. Who shall by this act be charged to yeeld recompence.

3. Who shall take the benefit or advantage of it.

4. How farre or in what measure the advantage shall be taken.

5. What way or by what meanes it shall be had.

As to the first, this wasting is done divers wayes. 1. by the executor his plaine, palpable, and direct giving, selling, spending, or consuming the testators goods after his owne Will leaving debts unpaid. 2 By paying what is not to be paid, which yet is to be understood where there are debts payable and unpaid. 3. By the way formerly discourſed of, *viz.* the not observing the right method and order of payment. 4. By assenting to a legatees having a thing bequeathed, debts being unpaid. 5. By selling goods of the testators at an under value, for be the appraisement what it will, and let him sell for what he will, he must stand charged to the best and utmost value towards the creditors. Yet if upon a judgement against the testator or the executor, the Sheriffe sell some of the testators goods at an undervalue, this is no vastation of the executor, for this

difference

difference *Hody* chiefe Baron makes. But ſince an executor may happily prevent this act of the Sheriff by paying the due ſum upon ſale of the teſtators goods at the beſt value or otherwiſe, he is to be blamed to leave it to the cõſcience of the Sheriffe or Underſheriffe rather. 6. And laſtly this may be done to the executors ſmart by undue, *viz.* not legall diſcharging of any debt or duty pertaining to the teſtator, & that divers wayes requiring heedfulneſſe. As if an executor upon a bond of two hundred pounds forfeited for payment of a hundred pounds accept the principall, or perhaps alſo ſome uſe, coſts, or damage, and give a releaſe or acquitall of the whole forfeited bond, or of all actions or upon record acknowledge ſatisfaction upon judgement had. This is a waſting of ſo much as the penall ſumme is more then is received, and ſo far his owne goods ſtand liable to creditors not ſatisfied; and ſo doubtleſſe is it if he doe but give up the bond having no judgement upon it, though he neither make releaſe nor acknowledge ſatisfaction. But his verball agreement to require or ſue for no more, or his giving a note, of receipt for ſo much as he hath received, or delivering of the bond into a friends hands, or into a Court of equity in way of ſecurity to the debtor that he ſhall not be ſued for more, is no devaſtation, ſince ſtill the reſt in law remaines due and ſueable. So this ſets no more upon the executors

13. E. 3. Fitz. 91

Yea on the other ſide, if an execut. by payment of an 110 pounds, get in a forfeited bond of 200 pounds, it ſhal be an adminiſtrat. but of 110. pounds, 27. H 8. 6. p. Fitz. inſt.

ſcore then he received. But let him take heed of releaſing except he be ſure there be no other debts demandable. Nor only is there danger in releaſing of debts, but of treſpaſſes or other cauſes of action alſo. As if one take away goods from the teſtator or from his executor; If the executor make him a releaſe, this is a devaſtation, and makes his owne goods lyable to the whole value of the goods releaſed, as appeares by *Ruſſels* caſe, where the releaſe of an Infant executor to one who had taken and committed to his uſe Jewels and goods of the teſtator being pleaded, the releaſe was therefore held void in reſpect of nonage, for that if it ſhould have ſtood good, it had amounted to a *Devaſtavit*, and made the executors owne goods lyable, which his infancy conſidered had been hard. Another way of diſcharging, dangerous to executors, is ſubmitting matters of debt or duty, or touching goods taken away to arbitrement. For if by the award of the arbitrators the debtors or wrong doers bee diſcharged or acquitted without making full recompence, the reſt of the value will as to other creditors ſit upon the executors skirts, becauſe it was their voluntary act thus to ſubmit it to arbitrators. Thus may executors fall under prejudice, not onely by wilfull waſting or unfaithfull miſcarriage, wherein they are not to bee pittied, but through incogitancy and unskilfulneſſe alſo.

ſo. Nay, I may ſay truly that it is very hard for executors in ſome caſes to walke ſafely: For beſides that to finde out all judgements and recognizances by or againſt their teſtators, is of ſome difficulty more then for ſtatutes, whereof by ſearch in an Office deſcry may be had; yet with this difference, that ſtatutes marchant, and ſtatutes ſtaple may be and ſtand effectuall againſt executors, though not inrolled, albeit againſt purchaſers of the conuſors land they be not of force, if neglect be of inrolement within three moneths. But where ſtatutes or recognizances lye for performance of covenants upon ſale or leaſe of lands, mariage, agreements or otherwiſe; how hard is it for executors to know whether any covenant be broken or not; how hard to be ſure they finde out all bonds, bils, covenants, and articles in writing made and kept by others, whereby any money is due and payable before debts by contract or legacies: as alſo all promiſes or debts by contract payable before legacies: For the law hath preſcribed no time for their claime and demaund, and whether ſome ſuch thing or meane of publication were not fit to be enacted, let the judicious conſider. To attaine to this knowledge of the teſtators debts, I remember that it is by the Lord *Brooke* reported,

that in King *Henry* the 8th his time, Sir *Edmund Knightley* being executor to Sir *William Spencer*, made Proclamation in certaine Market Townes that the creditors ſhould come by a certaine day and claime and prove their debts, but hee for this was committed to the Fleet and fined. For that none may make proclamation ſaith the book, without warrant or authority from the King, except Majors and ſuch like Governours of Townes, who by priviledge or cuſtome may ſo doe. But the dangers are only where there is not ſufficient of the teſtators goods and chatels to ſatisfie both debts and legacies. For where there is ſo, the executor is not in any ſuch hazard as aforeſaid. This deſcry of danger may breed caution, and *Qui timent cavent & vitant.*

As to the ſecond wee ſhall have in conſideration two ſorts of perſons, *videlicet*, 1. His executors, there being many times divers executors, and the waſte or devaſtation done but by one. Next his owne heires, executors, and adminiſtrators, *videlicet*, whether he dying, this act ſhall fixe upon them, like charge and burthen for ſatisfaction, as upon himſelfe ſhould have lyen in caſe he had lived.

Touching his companions though altogether make but one Executor, yet the miſdoing of one

one ſhall not charge the reſt, nor make their goods liable to recompence: as both appeares by the Booke of entries, and was alſo held in the time of *Henry* the ſeventh, Anno 12. of his raigne. Yea, of the ſame opinion were the judges twice in the late Queenes time, *viz.* firſt in a caſe betweene *Walter* and *Sutton*, in the common place, and ſhortly after in the Kings Bench in a caſe between *Hankeford* and *Metford*; though theſe two caſes bee not reported in Print. And ſurely this ſtands with rules of reaſon or juſtice, that each ſhould beare his owne burthen; If it were otherwiſe, many would decline, & abandon executorſhips as very dangerous to the moſt honeſt, and faithfull, in caſe they were ſubject to wracking by the miſcariage of their Colleagues.

Lib. Intra. fol. 327. Kelw. rep. fol. 23. So. 11. H. 6. 38. a. 4. El. Dy. 210 a. the writ ſo iſſued againſt the waſter only P. 4. H. 8. rot. 303. Tr. 34. Eliz. Paſ. 36. Eliz.

As for the Executors, or Adminiſtrators, of the waſting Executor dying before hee have born the burthen of his miſ-doing; I have found contrary opinions even in the late Queenes time. For firſt in the *Exchequer* it was conceaved to bee as a treſpas dying with the perſon, as comming within the rule, *Actio perſonalis moritur cum perſona*. But in the ſaid caſe of *Walter* and *Sutton*, the court of common plees was of contrary opinion, *viz.* that this was not eſcaped by the death of this miſdoer, but the law would purſue his Executors or adminiſtrators; and lay upon their backes the burthen of recompence or ſatisfaction; for that the teſtator or

Mich. 31. & 32. Eliz. Tr. 34. Eliz.

inteſtate doing this wrong had made himſelfe to bee debtor in the firſt teſtators ſtead, and therefore they who repreſent his perſon muſt with his goods make amends, and ſupply; And this later opinion was ſomething in time after the former. Alſo betweene theſe two times was there an opinion in the ſaid Court of common plees agreeing in part with this latter: For there a judgement being had againſt an Executor, and the Shriefe upon the *Fieri facias*, returning that there were no goods, of the Teſtator in the Executors hands, and then this Executor dying; A *Scire fac.* upon a ſuggeſtion of devaſtation by the ſaid Executor deceaſed was awarded againſt his Executor, and that upon good debate, and ſhew of a *Preſident* left, and reported by M. *Ieuour* in King *Henry* the eight his time. And it was then ſaid to have beene cleare, that if a devaſtation had beene returned in the life time of the ſaid *Waſtfull Executor*, his *Executor* then ſhould have beene charged. All the doubt was for that heere that was not done in his life time, yet at laſt affirmatively (as above is ſhewed) the reſolution was.

Tr. 34. Eliz.

Mich. 32. & 33. Eliz.

Touching the third point, *viz.* to whom the advantage of waſting ſhall accrue or who by reaſon thereof ſhall charge this waſting *Executor*. Put wee the Caſe that the Teſtator ſtood indebted to *A.* by Statute, and to *B.C.* and *D.* by ſpecialty, not of record, as Bond, Bill, *&c.* and

the

the Executor having no more in assets then only that hundred pound, and this all being due to *D.* hee payeth him the whole hundred pound not having any thing left to satisfy any of the rest of the Creditors: hereby wrong is done to none but *A.* who was a Creditor by Statute, and therefore hee onely shall make this *Executor* to pay the like summe out of his owne goods, since as to him only this is a devastation, for that it was his election, to pay of thother Creditors; which hee would, no sute being commensed by any of them; consequently no wrong was done to *B.* nor *C.* And if no such debt had beene by Statute but all had beene Creditors by specialty, and *A.* onely had commensed sute, and that knowen to the *Executor*, now if after hee payed all to *D.* hee stands only as to *A.* liable in his owne goods, and not to *B.* nor *C.* But if the *Executor* had onely payd a legacy or debt by contract leaving nothing for satisfaction of the debts by specialty, then had hee stood equally liable to each of the other Creditors, *Capiat qui capere potest*, *viz.* hee who first could recover, or by the voluntary act of the *Executor*, could obtaine payment, must bee preferred: if the summe would reach no further. For it shall by this mis-payment, or misconversion stand with the *Executor*, as if hee had not payed it nor departed from it at all upon the matter, and therefore *I* doubt not but it is free for him to give the advantage of this his error, to which Creditor by specialty

If upon fully administred pleaded to one vel aliter, hee have the advantage of this vastation, taking up the whole summe wasted, quæ. how the Executor shall relieve himselfe against another.

ty hee will, ſo as hee ſhall ſtand free from all the reſt, no ſurpluſage remayning, nor any Creditor of record being. For if there bee any debt upon record, the Executor ſued by a Creditor upon Bond may notwithſtanding this his waſting plead in Barre of this ſute; that there is ſuch a record of a debt not ſatisfied, and that hee hath no more then that debt amounts unto, and ſo admit ſo much ſtill in his hands as hee hath miſadminiſtred, though in kinde it bee not in his hands, but miſpent, or unduly payed, as aforeſaid. And what is before ſhewed of the Statutes precedency before Bonds, in taking the advantage againſt an Executor for devaſting or waſting; the ſame is to bee underſtood of precedency of judgements before Statutes, and debts to the King before judgements, &c.

As touching the fourth point, viz. how far the Executor thus waſting ſhall incurre dammage or make his own goods liable: Doubtles no further then the value of the Teſtators goods waſted or miſ-adminiſtred. Therefore if one have advantage thereof to the full ſumme, no other after ſhall, for hee is no further a treſpaſſer or wrong doer, nor is the Teſtators eſtate any further, or deepelier damnified. And as damages for treſpas are to bee proportioned to the value of the wrong done, and loſſe ſuſtayned: So alſo in this caſe the Executor by his miſdoing, doth not draw upon himſelfe his Teſtators whole debts, but ſo much onely as the

the goods amounted to, which hee did misadminister, and which should have gone to the payment of the Testators debt, if hee had not so misguided himselfe in the office of executorship, which default hee must repaire or make good. And this proportion seemes to me prooved by the Case in King *Edward* the third, where the value or quantity is found, specially of the goods administred wrongfully; though there by a wrongfull person, and in *Suttons* case it was expresly held that each Executor should answer for so much as he wasted. 41.E.3.31 b.

Now for the fift, and last point, *viz.* how and in what manner reliefe shall bee had upon this point of wasting, for him to whom it pertaines, first this is to bee observed that in case where the verdit passeth directly against the plaintife, no devastation can come in question, for that no judgement being for the plaintife, no writ of execution can issue, and therefore if upon the issue of fully administred it shall appeare that there hath beene a devastation which causeth assets to faile, then must the Iury finde that the defendant hath assets, and not finde a devastation, as was resolved in the Kings Bench in the late Queenes time betweene *Hankeford* and *Metford*, for there the jury finding a devastation, *viz.* a surrender of a lease for yeeres, left by the Testator, it was held voyd, and nugatory, and was not regarded by the Court, which said that must come in by the Sherifes returne, *viz.* upon the *Fieri* Pas.36.Eliz.in 6.reg.

fee. Thus affets being found in the Executors hands, judgement is given for the plaintife to recover his debt, and to have it levied of theſe affets; nor is this finding of them by a jury againſt truth, though they bee waſted, and ſo not to bee had in kind: for the *Executor* hath them in right, ſince hee hath not rightfully parted from them according to the rule, *Propoſſeſſore habetur qui dolo (or injuria) deſiit poſſidere*. As in the caſe firſt put, this waſting cannot come in queſtion for want of a judgement for the plaintife, ſo alſo where the judgement it ſelfe extendeth to the *Executors* owne goods by reaſon of ſome falſe plea whereof wee ſhall after conſider, for ſince that the conſequence, and effect of a vaſtation is but to make the *Executors* owne proper goods liable to the debt of the Creditor, this is altogether needleſſe where the judgement it ſelfe hath layed hold on his goods. But now in caſe where the judgement extends onely to the Teſtators goods in the *Executors* hands, let us finde the way to releive the Creditor, in caſe the Teſtators goods bee waſted by miſadminiſtring or otherwiſe, for hereabout the right way hath often beene miſſed, and againe eaſily may bee. In the latter end of the late Queenes time this courſe was taken, *viz*. the Sherife returning generally that the Executor had no goods, a ſurmiſe was entred that the *Executor* had converted to his owne uſe the Teſtators goods, whereupon a writ was awarded to the Sherife

45. Eliz. Pettifers caſe.

Co. lib. 5. fo. 32

Sheriffe to enquire thereof by jury or enqueſt, which he did, and returned that it was found that the executor had waſted the goods; and thereupon a *Scire facias* was awarded againſt the executor, to ſhew cauſe why execution ſhould not be of his owne goods, and upon two *nihils* returned, execution was ſo awarded, but a writ of error was hereupon brought. And although it were ſaid for defence of that courſe that it was uſuall in the Cõmon Pleas, and more favourable than the other courſe, where the Sheriffe only returneth the waſting, or is ſole judge thereof, whereas here it was found by an inqueſt of Jurors, and thereupon a *Scire facias* awarded; yet did the Court reſolve the contrary, and reverſe this execution as erroneous: For it was ſaid that upon the Sheriffes returne of *nulla bona, viz.* that there were no goods of the teſtator to be found, the plaintiffe ſhould have a ſpeciall writ of *Fieri facias*, willing the Sheriffe to levie the ſumme recovered, either of the goods of the teſtator, or if it could appeare that the executor had waſted the teſtators, then to levie it of his own goods; and this way, as was ſaid, the executor hath good remedy by action againſt the Sheriffe, if without juſt cauſe hee levie it of his goods; but the other way, *viz.* when inqueſt is thereupon taken, the remedy failes, ſince neither ſheriffe doing according to the inqueſt, can be puniſhed, nor the jurors finding falſely are ſubject to any attaint, it being no verdict

So 9.H.6.f.9.

See Paſton 11. H.6.16.36. upon ſurmiſe that *A* hath waſted, *A. Fieri facias* may iſſue againſt his goods onely. If ſo, &c. So lib. Intra. f. 11.

upon iſſue joyned, but an inqueſt of office, which excludeth alſo all challenge of jurors. And whereas that booke mentions the Sheriffes ſubjection to action onely in caſe of his miſ-feaſance or doing wrong, I conceive that hee is likewiſe ſuable for omiſſion or non-feaſance in this caſe, *viz.* for not levying the debt upon the executors owne goods where proofe is made of his waſting. And where the booke mentions this *Fieri facias* to bee in this manner upon the Sheriffes returne in a *Scire facias*, doubtleſſe the booke therein is miſprinted, and ſhould be a *Fieri facias*, for in a *Sciri facias* the Sheriffe can returne nothing but that he hath warned the party, or that he hath nothing whereby he may be warned. This then is the courſe there preſcribed, that firſt a generall *Fieri facias* go out, and that thereupon the Sheriffe returne generally that the defendant hath no goods of the teſtators, and that thereupon the ſaid ſpeciall writ is to iſſue; yet in the beginning of the late Queens time the verdict paſſing for the plaintiffe upon the iſſue of fully adminiſtred, the Sheriffe was not permitted to make ſuch a generall return of no goods to be found of the teſtators, but was inforced by the Court upon good adviſement, either to leavy the debt, or to returne a *Devaſtavit*; and ſo was done at laſt by the Sheriffes of London much againſt their minds; and therupon went out a writ to leavy the debt of the executors owne goods, firſt into London, and after into Devon-

Co. lib. 5. 32.

2. El. Dy. 185. Woodw. and Chicheſters caſe.

Devonſhire, upon a *Teſtatum* that the executor had goods there: And it was there ſaid, that if no goods could bee there found, then the plaintiffe might have a *Capias* to take the executors body in execution, or an *Elegit* for the moiety of his lands. But certainly I cannot find (except with a difference) how this courſe of inforcing the Sheriffe to doe one of theſe two can be juſt; as neither could Juſtice *Fulthorp*, in the time of King *Henry* the ſixth, approve it. For a Jury of one County may finde aſſets in another County, as was reſolved in the time of King *Henry* the eight, which yet was underſtood of goods moveable, and not of lands. This then thus being, if a Jury of Kent find aſſets which be in London or Eſſex, how can the Sheriffe of Kent, where the action was laid, leavy the debt recovered by or out of theſe goods; or ſince he cannot, why ſhould he be compelled to make a falſe returne of a waſting, when the goods remain unſpent and unwaſted in another County? Why rather ſhould hee not bee ſuffered to returne according to truth, that there is nothing within his Countie or Bayliwicke whereof the debt may be levied, ſince even his oath tieth him to make a true returne, nor is this contrary to the verdict, finding aſſets generally, and this ſo returned upon a *Teſtatum*, the proceſſe may be directed into the right County. But in the ſaid caſe it was replied to the plea of fully adminiſtred that there were aſſets in Eſſex, the action being

11. H. 6. f. 38.

28 H. 8. Dy. 3. Yea, Co. lib. 6. f. 47. 46. Aſſets in Ireland, or elſe-where beyond the ſea, may bee found by the Jury where the action is laid.

For the pl. may if he will ſuggeſt, the being of aſſets in a forren County, and this is uſually done. See lib. Intr. 11. a. Action upon the caſe for a falſe returne of Devaſt. contra ſacram. ſui debitum. 28. H. 8.

laid in Middlesex, and yet as it seemes by the booke, the triall was to bee by a Jury of Middlesex, which, saith the booke, may find the assets in Essex; but there the plea was demurred upon, and held a good plea, which proves that although the transitorinesse of the assets make them subject to the notice of a forren Jury, yet is it not like an act transitory and not locall, for that must be pleaded to be done in the place where the action is laid, though in truth not so. But had issue been joyned upon the point, me thinkes it should be tried in Essex, where the assets be laid, the rather for that perhaps they may be reall chattels, *viz.* lands leased to the testator, or other lands of him appointed to bee sold for payment of debts, which as heretofore hath been held, a Jury of another County cannot find. Besides, although such a forren jury may find other moveable assets, yet is at their election, they are not thereto compellable, as else-where is holden. Here then may be the difference, *viz.* that if the assets be found to be in the County where the triall is, there the Sheriffe of that County cannot returne *Nulla bona*, without adding that the executor hath wasted: but if there be no verdict at all touching assets, judgement passing against the executor upon a demurrer, confession, *Nihil dicit*, or the like; there may the Sheriffe make such a returne of *Nulla bona testatoris*, without returning any devastation: and so also where the verdict either findeth

2. Ma. Bro. Attaint. 104. and 10. Eliz. Dyer. 271.

Because locall and fixed, otherwise held, 3. Jac. in com. b. Co. lib. 6. f. 46. 47.

22. E. 4. 9. and 2. Ma. Bro. Att. 104.

18. H. 7. Kelw. rep. 51. a.

So held. P. 31. El. in scaccar.

So if the proces for execution goe into another County, than where the verdict found, as the diff. was held in Scaccar. 31. El.

assets

assets generally not finding in what place they bee, or expressly findeth them to bee in another County, as a little before wee found, may bee done by a jury of *London*, of assets in *Essex*. 28.H.8.Dy.30. b.

In King *Henry* the eight his time, as a little after the said case of *Chichester*, is by the Lord *Dier* reported, the Sherife returning upon the *Fieri facias*, that the Executors had no goods of the Testators, did ad in the same returne that one of the two Executors had wasted, and thereupon a *Scire facias* was awarded against him, and upon *Scire feci* returned, and default made, execution was adjudged, and awarded against his goods onely, and this course of *Scire facias* both the Lord *Dier* (as elsewhere *I* finde it reported) and *Priot temp. Hen.* 6. approved. But *I* am perplexed with doubt what plea the Executor comming in upon the *Scire facias*, could plead, for except his deniall of wasting might bee pleaded contrary to the Sheriffes returne, and put in issue so as to cause a new triall after a former perhaps preceding judgement, which *I* thinke would not bee admitted, then his comming in is to little purpose for ought *I* can conceive. Heere againe it must bee observed that in the case of *Chichester*, the judgement was had upon tryall of fully administred, but in thother case *temp. Hen.* 8. it was upon confession, which is all one as *I* take it, with condemnation upon *Demurrer* or *non sum informatus*, or triall upon *non est factum* the Bond Pas.4.H.8, rot. 303 4.El.Dy. 210. But 2.H.6. 12. without any Sci.fac: upon the devast. returned, A capias was awarded by the court; & see 9.H. 57. Bro. Ex.57.& lib.Intr.323.A Fieri fac.absolutely,& without condition. So.9.H.649.50. A manu-scripi report. 36.H.6,f. 3. & Mordant 12.H. 7.Kelw.rep.24. but vavasor. just. and all thother serjeats è contra. 2.El.D.189.

or

or a releaſe to the Teſtator or the like. Now betweene all theſe, & that of *Chicheſter* there is a broad difference, for there the defendant being convinced by verdit to have aſſets, which if they continue not in his hands, in kinde, muſt bee anſwered out of his owne goods as waſted, therefore the *Fieri facias* to leavy the debt of the Teſtators goods, if any found or in default thereof out of his owne goods is very agreeable, and purſuant, but in none of thother caſes is there any ſuch triall or conviction of the defendants having aſſets, ſo as it reſts *æque dubium*, whether they have aſſets or not, and therefore it may ſeeme ſomewhat hard, and harſh to ſend out ſuch a writ in that caſe, and ſo ſhould *I* have thought if *I* had onely ſeene the report of *Pettifers* caſe; But looking into the record, and finding the condemnation there to bee by *Nihil dicit*, in effect *I* cannot uphold any diſtinction of courſe in reſpect of the ſaid difference of caſes. Nor indeede doth that courſe there directed preſume that the Executor either hath aſſets, or hath waſted them, but commands that if aſſets, &c. then the leavying ſhall bee one way; if waſting, then another way, ſo if neither *Nihil fiend.*

Co. lib. 5. f. 32. Mich. 41. El. rot. 2441.

Co. lib. Intr. 269. b. A recovery of debt precedent was pleaded: Pl. replied nul tiell record, & def. would not maintaine his plea. Ideo condemp.

If neither, hee muſt ſo returne and doe nothing.

Cap.

Cap. XIIII.

Of an Executor of his owne wrong.

TO begin with ſome definition, or deſcription of this man; Hee is ſuch as takes uppon him the office of an Executor by intruſion, not being ſo conſtituted by the Teſtator or deceaſed; nor for want of ſuch conſtitution ſubſtituted by the ordinary to adminiſter. Touching whom we will conſider in theſe parts, and with this method, *viz.*

1. What acts or intermedlings of ſuch an one not being executor nor adminiſtrator by right, ſhall make him to become an executor by wrong. *vide* 5. more perſtat. 43. *E. cap.* 8.

2. In what manner, and by what name ſuch ſhall bee ſued, ſpecially when another then is executor or adminiſtrator or himſelfe after ſuch act becomes adminiſtrator.

3. What acts done by him ſhall ſtand firme, as if he had been an executor by right.

How farre hee becomes liable to creditors, and how, and to whom. 5. See a late ſtat. 43. *El. cap* 8. hereabout.

As to the firſt, it was in the time of Queene *Mary* doubted, and not reſolved whether the onely ſeiſing, and taking into ones hands the goods of the deceaſed did make one executor [1. And 2. P. & Moſ. Dy. 105. b.]

of his owne wrong without any further act.

1.Eli.Dy. 166. & 167. So also Balkn.50, Ed. 3.9.

And in the beginning of the last Queenes time the Lord *Diar* said that the possession, and occupation of or medling with the goods is that which gives notice to Creditors, whom they are to sue as executor. But doubtles Creditors must looke further before suit, for else can they not know whether hee so intermedling bee executor or administrator, nor consequently how to found their suit rightly, and safely for good successe, since a suit against an executor as administrator, or against an administrator as executor, will prove ruinous, and fall to the ground. Yea where an administrator sued as executor did not plead that administration was committed unto him, but generally denied that hee was executor or administred as executor, the Lord *Diar* held that it must bee found for him, yet left it doubtfull: but the cleere and safe way had beene to have pleaded the administration, &c. And in the former case the Lord *Dyer* said, that one intermedling only about the funerall, and laying out money therefore; an overseer or conductor, or hee who hath Letters of the ordinary *ad colligend. viz.* to get and keepe the goods in safety, and one who intermedleth by vertue of a will truly made, but controlled by a latter will after found and proved, may free himselfe from being an executor of his owne wrong by speciall pleading how or in what right hee intermedled, and traverſing his administring in other manner,

13.& 14. Eliz. Dy.305,306.

1.Eliz.Dy.166 & 167. see lib. Intra.f.322.b.

ner, and that this traverſe neede not, nay may not bee; was held in the time of King *Henry* the 6th. and 7th. for that ſuch acts amount not to any adminiſtring at all: and where no adminiſtring at all is confeſſed; ſuch a traverſe of not adminiſtring in other manner is diſſonant, and not legall. But let us looke backe upon theſe ſeverall points exempted by the Lord *Dyar*, and wee ſhall ſee ſome cautions neceſſary touching them, and their ſafe entertaynement, firſt as touching the point of burying the dead, it muſt bee underſtood to bee with ſome expence of the deceaſeds goods, and ſo is it expreſsed in the ſaid Booke of *Henry* the 6th. his time: elſe for a man out of charity, to lay out of his owne money (not intermedling with the goods of the deceaſed) to bury a friend, hath little colour to involve him ſo doing in an executorſhip by wrong: taking the caſe then that ſuch perſon layes out or expends of the deceaſeds goods or money upon his funerall, heede muſt bee taken touching the meaſure, and proportion whereabout, though *I* can give no particular, and diſtinct lymit, yet doubtles either meere neceſſity, *viz.* Church duties, &c. or at leaſt decent ſutableneſse to his quality muſt bee the bounds. And herein to ſpeake as *I* thinke, this latter muſt either bee utterly excluded, or held within very narrow compaſſe, for what reaſon that a Knight or man of higher quality leaving (though perhaps entayled Lands of good value)

21.H.6.28. 10. H.7.28. Yet lib. Intra. 322. b. where he confeſſed about funerall he traverſed aliter.

Lib.Intra.322. where by letter ad collig. Hee traverſed; Abſq;hoc quod & Exec.

21.H.6. 28.

yet goods not ſufficient to pay his debts, ſhould have a hundred pounds or more of that which ſhould ſatisfie Creditors ſpent in pompous interring of him for his worſhip, and reputation? next overſeers may onely bee excuſed for ſeeking to preſerve, and keepe the Teſtators goods not in caſe they expend or diſpoſe thereof. So alſo for him who is autorized by the Ordinary to collect, for if hee ſell or diſpoſe of any (though goods otherwiſe ſubiect to periſhing) it makes him an executor by wrong, as was reſolved in the late Queenes time notwithſtanding that by the Ordinaries Letters, he was expreſly directed or warranted ſo to doe, for it was ſaid the ordinary himſelfe could not ſo doe. As for him who adminiſtred by vertue of a will after diſproved or controlled by a latter, Hee muſt not doubtles ſtand free, for the goods before adminiſtred, but either as rightfull or wrongfull executor ſtand lyable to the Creditors. Nor doth every ſuch intermedling by one out of all theſe excuſes, and evaſions, as would bee an adminiſtration, make one an executor by wrong. If one doe but take an horſe of the deceaſed, and tye him in his Houſe or Stable, this makes him not an executor, ſaith *Patton* a juſtice; So of like acts or intermedlings, as hee that delivers to the wife of the deceaſed her apparell, at leaſt if it bee no more then is convenient to her degree. But if ſhee take, or another deliver more then ſuch to her, ſhee or hee becomes an executor by wrong.

Lib. Intr. 322.

8 and 9. Eliz. Dier. 255 256. He ſold bl ended corne, but there hee pleaded not the ſpeciall matter.

1 And 2. P. & Ma. Dyer. 105.

21 H. 6. 28.

33 H. 6. 32. 2 Eliz. Dy. 166

wrong: But now let us come to a difference, where there is a rightfull executor, and a will by him proved, or administration committed, for there such light acts or intermedlings shall not make one an executor by wrong, as where there is no other of right to be sued. As if one take goods wrongfully frō such a right executor or administrator; This (though he convert them to his owne use) makes him not an executor by wrong, but a trespassor to the rightfull executor or administrator, who even for these goods once Assets in his hands stands lyable to suits of creditors, they being neither lawfully evicted nor rightly administred: But in case there had beene no executor at that time, or no Will proved nor administration committed, then such taking of the deceaseds goods into a strange hand had made an executorship by wrong. And thus was the difference lately resolved, as is reported by the *Lord Cooke* in the case betweene *Reade* and *Carter* in the Common Place.

Tr. 37. Eliz. by Fenner Just. If one doe any such act as puls the property out of the executor, he is become an executor by wrong

If the goods be aliened by fraud, he who takes them after the executors death is an executor by wrong. Tr. 37. Eliz. L. 5. E. 472 a. Tr. 2. Jac. in com. b. Co. lib. 5. 33 & 34.

Yet this further difference was there held, *viz.* that although there be an executor or administrator by right, yet if a stranger take upon him to receive debts and make acquittances, or to pay debts claiming to be an executor, he is sueable as an executor by this act: and so also in the late *Queenes* time was held by 6. Just. as touching the receipt of debts and making acquittances, but the book mentions not whether any other executor then were, or not.

1 El. D. 166. b.

not. But in the point of bare payment of debts
H.20.7.5. Frowick makes another difference, *viz.* If a ſtranger do with his own money pay the debts of a friend deceaſed, and not with the debtors: This is but an act of charity, and makes him not an executor by wrong, otherwiſe, if with the debtors money. Yet to this another difference muſt be added, *viz.* that if he thus paying with his owne money, have taken into his owne hands goods of the deceaſed; then is his payment preſumed as by or out of the value of theſe goods, and ſo makes him an executor by wrong. Contrarily, if he have no ſuch goods in his hands. And in the point of intermedling with and diſpoſing of the teſtators goods where another executor is; this further difference is to be added or underſtood, *viz.* That where the goods ſo taken never came actually to the executors hands, but were in a remote place, there this taker becomes executor. For as it were miſchievous to the executor if he ſhould by a poſſeſſion in law caſt upon him ſtand chargeable with theſe goods in remote places purloyned as aſſets in his hands; ſo were it as miſchievous to creditors, if neither executor by right, nor this ſtranger as an executor by wrong ſhould ſtand lyable to creditors for them. It is true that the right executor may ſue and recover damages for them, and that ſo recovered ſhall be Aſſets; but the creditor hath no meanes at the Common law to inforce him to ſue, and perhaps it

may

may be a cold ſuit. And with theſe additions I think that late reſolved difference may ſtand firm and ſound. Yet in former times without ſuch difference the taking only and poſſeſſion of the goods of the deceaſed, was held to create an executorſhip by wrong, as *Belknap* ſaid in the time of King *Edw.* 3. and eſpecially if the act were ſuch as removed the property out of the right executor, as Juſt. *Fennar* in the late *Queenes* time ſaid, *Teſte meipſo.* 50. Ed. 3. fo. 9. Tr. 3. Eliz.

How and by what name ſuit ſhall be againſt ſuch, and the like.

TOuching the ſecond point, *viz.* in what manner ſuit ſhall be againſt ſuch: Firſt in generall, this uſurping executor is not in ſuit to bee diſtinguiſhed by name from the right executor, but to be ſued generally by the name of executor, of the laſt Will and Teſtament of the defunct, and then if he will deny himſelfe ſo to be, he muſt pleade, that he neither is executor, nor hath adminiſtered as executor: Then the plaintife muſt prove that he hath adminiſtred in ſome ſuch or the like ſort as aforeſaid. And it hath beene divers times held, that where there is a right executor, and yet another doth adminiſter by wrong, it is at the election of Creditors either to ſue them joyntly together, or one or both of them ſeverally and by himſelfe. But if where adminiſtration is committed, another alſo adminiſters 2. *Point.* L. 5. E. 4. 72. Co. lib. 5. 30. 31. & 33. b. 21 H. 6. 8. Co. lib. Intra. 144. but 145. a. in the verdict. hee is called Exec. De injuria ſua propria. 39 H. 6. 45. 46. 21. H. 6. 8. 19. 9. E 4. 14, 15. 1 & 2. P. & M. Dy. 165. 33. H. 6. 38.

by

by wrong, theſe cannot be ſued together as adminiſtrators; for though one may be an executor by uſurpation or wrong, yet none can come to be an adminiſtrator by wrong, ſince no other but ſuch as receiveth that power from the Ordinary can ſo be; therefore in that caſe there is a neceſſity of ſuing him apart and by himſelfe (who ſo uſurpeth adminiſtration) by the name of an executor. So if *A* adminiſter the goods of *B*. not being executor nor adminiſtrator, and after his ſuch doing and diſpoſing of the goods he obtaineth adminiſtration of the goods of *B*. but the goods left or comming to his hands ſince the adminiſtration committed ſuffice not without the other debts received or releaſed, or goods ſold before, to ſatisfie creditors. Now if any ſue *A* by the name of adminiſtrator, he ſhall have no further reliefe then according to the value or extent of the goods left in or come into his hands ſince the adminiſtration committed, and if thoſe be fully adminiſtred, he ſhall get nothing. If they remaine unadminiſtred, but amount not fully to his debt, he muſt want ſo much of ſatisfaction. And if he will be releeved or ſatisfied out of the goods before diſpoſed of, he muſt ſue *A* as executor of *B*: and ſo was it ruled and reſolved by *Gawdy* and *Suit*, Juſtices in the Kings Bench in the late *Queenes* time, *viz. Tr.* 30. *Eliz.* And if this now adminiſtrator will pleade in abatement of this action, that adminiſtration was committed to him, and demand judgement

35. H. 6. 31.

2 R. 340.

21. H. 6. 8. If the adminiſtration were committed before the ſuit began, the writ ſhall abate, elſe not, as was of old conceived.

ment if ſuit ſhall be againſt him as executor. Then the plaintife muſt in this replication as I take it, ſet forth the ſpeciall matter, *viz.* how the defendant did adminiſter before adminiſtration to him committed. But if one to whom adminiſtration is committed do devaſt, and this adminiſtration is by ſuit repealed becauſe he was not the next of kinne, and adminiſtration is committed to another; now a creditor who would be relieved out of the goods waſted, muſt ſue that firſt as adminiſtrator and not as executor of his owne wrong, ſaid *Popham* Chiefe Juſtice, for he did rightfully adminiſter for that time.

As for the third, *viz.* how farre this executor of his owne wrong, becomes lyable and obnoxious to ſuites, conſider we theſe things; firſt he becomes ſubject both to the action of the executor who hath right to the goods wrongfully intermedled withall by him though it were before proving of the will, and alſo to the action of the creditor who hath right to the ſatisfaction of his debt. Secondly, as touching the meaſure how farre hee is ingaged, doubtleſſe hee is not by his wrongfull adminiſtring become chargeable with the whole account of the teſtators debts, but only ſo farre, and with ſo much thereof, as the goods which he ſo wrongfully adminiſtred amount unto, and this ſeemes to me proved by the caſe in the time of *Edward* the third, where the inqueſt found not only the adminiſtring or

3 *Point.* How far liable to creditors.

Yet hee muſt looke to his plea, elſe by it he may draw al ſued for, upon himſelfe, as if he deny his being executor or adminiſtrator. Co. lib. Intr. 144. 145. *Plac de hoc.*

intermedling by the executor wrongfully, but found also by direction of the Court (as it seemeth) what the value was of the goods so wrongfully administred, which had not beene materiall, if the administring of a peny had made one as far chargeable as the administring of a pound. Besides, if it be so that a rightfull executor wasting goods of the testator to the value of twenty pounds, shall be no further charged than that value; then doubtlesse so shall it be also in this case, for both be wrongfull administrations: only this difference there is betweene them, that in one case the administration is by a wrong person, and in the other case in a wrong manner. Nay, the Lord *Dyer* doth not sticke to call him, who administreth wrongfully, or in undue manner, expresly an executor by wrong, in the case of *Stokes* against *Porter*, though he were rightfully executor, because he did dispose or execute wrongfully.

1. El. Dy. 167. cap. 12.

4 *Point.* What acts of his of force.

As to the fourth, *viz.* what acts done to him or by him who is an executor of his owne wrong, shal stand firme and good, as done by or to the right executor. Suppose, first, that the deceased were indebted to him twenty pounds who thus usurpeth executorship, whether may he pay himselfe or not? And this point was in debate in the Kings Bench betweene *Coulter* and one *Ireland*, executor of *Hunt*, where it was strongly objected, that notwithstanding the rightfull executor or administrator might

M. 40. 41. Eliz. Co. lib. 5. f. 30.

punish

puniſh him, and recover againſt him for the goods which hee adminiſtreth; yet another creditor ſuing him as executor generally, and ſo affirming him to be (for there is no ſpeciall forme of writ or declaration to diſtinguiſh an executor by wrong from a rightfull executor) he ſtands as againſt him in the ſtate of a rightfull executor, and therefore may firſt pay himſelfe before he pay others; and of that mind at the firſt were *Fenner* and *Gawdy*, Juſtices, yet did they admit that this payment ſhould not ſtand good, as againſt the rightfull executor or adminiſtrator. And *Popham* and *Clinche* held ſtrongly that neither ſhould it ſtand good againſt other creditors, for then every man would ruſh upon the teſtators goods and be his owne carver in payment: And whereas it was ſaid at the barre, that the Lord *Anderſon* upon an evidence at Guild-Hall had ruled it otherwiſe, *Popham* at another day of debate of the ſaid caſe, related that the L. *Anderſon* did deny that he ever ſo ruled, or was of that opinion; and further informed that both he and Juſtice *Walmeſly*, *Periam* and *Clarke*, Barons, did agree with *Popham* and *Clinche* in opinion. After which, Juſtice *Gawdy*, as alſo *Fenner*, if I miſtake not, changing their opinions, and concurring with the reſt, judgement was given accordingly. In the debate of this caſe, queſtion was made, if ſuch an executor by wrong pay a debt to another creditor by ſpecialtie, whether this ſhall not ſtand firme and good, ſince hee

ſtands lyable to creditors ſo farre as the goods by him adminiſtred doe amount, and it was agreed by the better opinion at leaſt that this ſhould ſtand firme and good, ſo as if the payment were out of his owne goods, he might retaine to himſelfe in liew thereof ſo much of the goods of the teſtator, for here he doth not, as in the other caſe, advantage himſelfe by his owne wrong. Yet that opinion allowing this payment to creditors muſt, as I think, bee underſtood with this difference; *viz.* that this payment ſhall ſtand as againſt other creditors, but not as againſt the right executor or adminiſtrator, for then any ſtranger might uſurpe the office of executor, and take from him that liberty and election to preferre which creditor he will in firſt payment; yea, might take from the executor power to pay himſelfe before other in caſe there were a debt due to him, which were very unreaſonable.

Of addition and alteration by the ſtatute 43. Eliz. cap. 8.

5 *Point.* WEe having conſidered what the Common law is, and willeth in the premiſes: Let us now ſee what alteration or addition a late ſtatute hath made. In the laſt Parliament of the late Queene *Elizabeth*, conſideration being had of ſubtill getting into mens hands goods of an inteſtate by deed of gift, or letter of atturney from one of ſmall or no abi-

lity

lity to whom ſuch ſubtle contriver hath procured adminiſtration to bee committed, and ſo himſelfe would ſtand free from the ſute of Creditors, the adminiſtrator himſelfe either not being to be found, or not being of any valew to ſatiſfie Creditors. It was therefore enacted that every perſon, receaving or having any goods or debts of any inteſtate, or any releaſe or diſcharge of any debt or duty belonging to him upon any fraud as aforeſaid, or without conſideration of or neere the value (except in ſatisfaction of ſome juſt; and principall debt to the value of the goods or debts due from the inteſtate) ſhall be charged as Executor of his own wrong ſo far as the value of thoſe goods, and debts amount; deducting all principall juſt debt to him due, and all payments by him made, which a lawfull *Executor* ought to have paid. Heere have wee a touch of all the parts precedent, or atleaſt three of them.

1. Wee have firſt a new Executor by wrong though intermedling under the title of an adminiſtrator.

2. We have a limit of the charge by him incurred ſutable to our former expreſſion.

3. Laſtly, we have to him an allowãce of debts owing to himſelfe or duly paid to others, which is more then wee have conceaved allowable to another *Executor* by wrong.

Cap. XV.

Of pleas by Executors, and which bee beſt, which moſt prejudiciall to them.

SInce amidſt the Plees pleaded by Executors there is ſuch difference as that ſome induce one kinde of *judgement*, ſome another, ſome drawingmore loſſe, & burthen upon Executors then others: Let us conſider of the differences, ſo as light may bee taken to chooſe the ſafeſt or fitteſt for each caſe.

Plea; denying the Executorſhip. 21.H.6.19. 20. Bro.62. 2 E.4.f.4.1.9. H.7.15.

If an Executor doe utterly eſtrange himſelfe from the executorſhip; ſaying that hee was never executor nor ever adminiſtred as Executor (for that muſt bee added) then if iſſue bee taken upon this plea, and it bee found againſt him; the plaintiffes ſhall have iudgment to recover not dammages only, but even the debt it ſelfe out of the proper goods of the Executor, if none of the Teſtators can be found to ſatiſfie it. And this ſhall bee thus not onely where it is found that the defendant was made Executor by the will, and proved it, and ſo could not chuſe, but know it, but even alſo where hee had never proved the will whereof hee was made *Executor*, nor ever adminiſtred by vertue thereof: yea though hee did before the Ordinary refuſe to bee Executor of this

Lib. Intr. 322. 333.33.H.6.33. 34.

will

will, or to intermedle with the execution thereof; yet if any other named Executor with him did prove the will, or did not refuse to bee Executor, let such other refuser take heede of pleading that plea. For truth is against the first part of his plea, *viz.* that hee never was Executor; and so the verdit which must bee *veritatis dictum*, must needs passe against him, and make his owne goods lyable as well to debt as dammages. What if no other were made Executor but this onely who refused before the ordinary, may hee safely pleade that he never was executor? *I* thinke not, since hee so was executor before his refusall, that hee might have released all debts due to the Testator, and given away all his goods, therefore *I* thinke hee must plead specially shewing his refusall, and not generally deny his being Executour.

He was suable as soone as the Testator was dead.

Nay admit hee never was once named, made or intended to bee made executor, yet having pleaded this Plea, that hee never was executor nor administred as executor, if it shall bee found by verdict that hee did administer or intermedle as executor, the same blow or burthen falleth upon him, for then the latter part of this Plea is found untrue, yea the whole upon the matter, for by his administring hee became an executor of his owne wrong, and the deniall of this executorship by wrong or usurpation shall bee as penall to him as the deniall of a rightfull executorship. The like Law where the executor pleades a release made

But if hee did it as Adm. it is otherwise, yet see that specially pleaded Co. Lib. Intr. 148.a.

See Co. Lib. Intrac. Judgm. so entred fol. 145.b. Read & Carters case.

to

to himselfe, or a payment of the debt or other performance of the condition made by himselfe. Nay I finde in this latter case the iudgement entred generally against the defendant, as against another, for his owne debt, not being executor. And the reason why the Law makes these so penall to an executor is, because his Plea is not onely false, but the falsehood thereof was wilfull, since it must of necessity bee knowne to himselfe to bee so. And lastly for that all these Pleas, if they had proved true, had beene perpetuall barres at least against the defendant, the first indeede had not beene a barre against another being in truth executor or administrator. But if the executor had pleaded a release made to his Testator, finding such an one among his writings which yet was either forged or never both sealed and delivered by the plantife as his deed, or if hee pleade payment made by his Testator, neither of these Pleas found against him shall cause the judgement to fasten upon his owne goods, so if hee denyed the Bond or Bill, whereupon the Sute is grounded, to bee the Testators deede. For in all these cases the truth being not knowne to him, hee might honestly, and reasonably conceive it to bee as hee did plead. But what if hee plead fully administred, and this bee found against him, which rested in his owne knowledge? shall not this false Plea expose his owne goods in defect of his Testators to the satisfaction of this debt? no it shall not,

Co. Lib. Intr. 29.a. not first de bonis testatoris si, &c. See Bro. Ex. 22 these reasons for this diff.

33 H.6.23, 24.

So of other perform. Co. Lib. Intr. 133.a.

Plond: rom fol 440

6 E.4.1.7 E.4.8 Se Bro. Ex. c.22 that the Book contrarily reported 34.H.6. 22,23. is erroneous, as was descryd by Fitz. & al. 23. H. 8. the Record being not so as the Booke saith the judgement was.

not for that though this were a falſe plea, & that within his owne knowledge, yet was it not a perpetuall barre, for if it had beene ſo found as was pleaded, yet aſſets coming after to the hand of the Executor, the plaintife ſhould then have reliefe, and ſatisfaction out of theſe ſince accrued aſſets. If any aske how aſſets may after come. *I* will give him two or three inſtances. Firſt, it may bee by recovery of debts before withholden, or of damages for goods taken away, or by voluntary payment of a debt not before due, for that the time of payment was not come. Secondly, if the Teſtator having a leaſe for twenty yeeres did demiſe the ſame to *I. S.* for the whole terme, if hee ſo long ſhould live, if hee were alive in time of the former verdit, but now is dead, the terme continuing, this is now aſſets which before was not, whilſt it was but a poſſibility of a terme. Other inſtances might bee given, but theſe may ſuffice. If the Executor pleaded that the Teſtator ſtood bound in ſuch a Statute, or that there was ſuch a judgment againſt him of debt to the King, beyond the ſatisfaction whereof the goods would not reach: This is in effect a fully adminiſtred, though ſpeciall, and not generall, and the Law is alike (as *I* take it) in all theſe caſes as to the not making of the *Executors* goods lyable. But in all theſe cauſes though the debt ſhall not bee adjudged upon the Executors owne goods, yet the dam-ages ſhall, in default of the *Executors* goods

Lib. Intr. 148, 149. This good though the judg. were by non ſum inform. & no averment that it was without covin.

Co. Lib. Intra. 152.

11 H. 4. 5. There a capias vat. was awar-ded for the Dammages,

to satisfie them. And in these cases it is not materiall whether the judgement passed upon trial or demurrer. Nay if the defendant *Executor* plead no plea, but confesse the action generally, or bee condemned by *Non sum informatus*, the judgement is the same, *viz.* to record the debt onely out of the Testators goods, and the damages of the *Executors* goods in default of the Testators, what if the Executor defendant, confesse that hee have assets to the value of part of the debt, not of the whole; there for so much as is confessed the plaintife may pray, and have judgement presently without dammages, and may maintaine for the residue of the debt that the defendant also hath assets for the rest, and so goe to triall, as appeares both by the printed Booke of entries, and another manuscript which *I* have; But what if this triall passe against the plaintife? shall hee then have an additionall judgement for dammages in respect of the former? I thinke hee shall have costs, which commonly runne, with or in the name of dammages, but without a writ to enquire of dammages, none being found by Verdicts, the Court doth not usually adiudge dammages: yet in the Booke of entries *I* finde 6s. 8d. dammages assessed by the Court upon a confession in a writ of *Rationab. parte bonorum* against Executors, and this hath much affinity with the action of debt. Yea, in the very action of debt where the *Iurors* for miscariage after their departure from the Barre were fined, *I* find that the

But hee may I think forbeare so to doe, and to the judgement for part ad that when more assets come hee shall have more. Lib. Intracion. Fol. 223.

Fol. 542.

the plaintife renouncing the assessment of damages by them made ; and praying the Court to assesse the same, it was done accordingly, but this was a speciall case. M. 28. H. 6. Ro. 2. 321. Lib. Intra. 329. a.

Whereas wee before shewed that an Executor denying his executorship shall if it bee found against him, pay the debt of his owne goods for his false plea ; This thereabout occurreth to bee added, *viz.* that that is onely where the immediate executorship of the defendant is denied. For if *B.* bee made Executor by *A.* and *B.* dying makes *C.* his Executor ; now if *C.* bee sued for the debt of *A.* as Executor of *B.* Executor of *A* and hee denyeth that *B.* was Executor of *A.* which by consequence is a deniall of his being now Executor of *A.* yet if this fall out in triall against him, hee shall not in his owne goods stand liable to this debt ; because it is possible that hee might not know to whom his Testator was Executor. So if *A.* made *B. C.* and *D.* his executors, and *E.* is sued as executor of *D.* the surviving executor of *A*, if *E.* deny that *D.* his Testator survived *B.* and *C.* by consequence whereof hee denieth the truth, *viz.* that the executorship of *A.* is devolved to him, yet shall not this found against him, charge his owne goods, for hee might bee ignorant of this point in fact, *viz.* whether *B. C.* or *D.* lived longest. And heere hee denied not his owne immediate executorship, but a mediate or more remote executorship ; and so *I* thinke is the Law where *C.* being See Lib. Intr. 322.

C. being ſued as executor of B. executor of A. hee pleades that A. by a latter Teſtament made himſelfe executor which is found againſt him, ſo as heere hee falſely pleaded, and pretended himſelfe to bee the immediate executor of A. and ſo denied the mediate executorſhip, *viz.* of B. to A. and of him to B. yet *Quere* of this, for why ſhould not as well his falſe making himſelfe an executor immediate to the indebted Teſtator charge his owne goods as well as his falſe denying of that executorſhip; ſince both plees tend to the overthrow of the plaintifes action, and each equally reſted in the defendants knowledge. But this difference is betweene them apparant, *viz.* that the deniall of executorſhip, if true, is an utter, and perpetuall Barre to the plaintife, as againſt him ſo pleading; but the affirming of an immediate executorſhip where hee was ſued as executor mediate, doth not ſo it true, but directs the plaintife to a better writ or action, *viz.* againſt him as immediate executor to the indebted Teſtator.

Where we have before touched upon the comming of Aſſets futurely to executors, I think it not amiſſe to conſider a little the forme and frame uſuall in pleas of fully adminiſtred which thus runne, *viz.* *Quod die impetr. & plene adminiſtravit omnia bona & catalla quæ fuerunt præd. S. temp. mortis ſuæ, & nihil hab. de bonis, &c. quæ fuer. præd. S. temp. mortis, &c.*

Lib. Intr. 151.

Thus

Thus tying his deniall upon the things which were the teſtators at the time of his death. What if then the executor have at the time of this plea pleaded goods with were not the teſtators at his death, but ſince accrued as before is ſhewed, or perhaps a leaſe for yeares ſold by the teſtator upon condition to be void, if five hundred pounds not paid at ſuch a day, which hapning after the teſtators death and default made, the terme returneth; Or if the executor by a writ of error reverſe a judgement given againſt his teſtator for two hundred pounds, and ſo is reſtored thereunto: May the plaintife now reply generally that he hath aſſets which were the teſtators at the time of his death? How can the Jury ſo finde, when the truth is not ſo? Surely this caſe is not common, nor can I ſhew a preſident of a ſpeciall plea therein. But in reaſon me thinks it ſhould be ſpecially and not generally pleaded and ſet forth in the replication. And in caſe where one ſued as ex cutor denieth that he was ever executor or adminiſtred as executor, I finde ſometimes the replication generall that he did adminiſter without ſhewing wherein or how, and ſometimes ſpeciall ſhewing what thing was adminiſtred and where. Here note, that the executor defendant denying (as he muſt) two things, *viz.* 1. That he never was executor; 2. That he never adminiſtred as executor; the plaintife in his replication is tyed to maintaine but the one of them as the truth of the caſe is;

7. H. 4. 3. 9. Bro. 50. This plea is not good per cur. becauſe ſome may have ſince accrued.

Lib. Intrac. 312. a. b. but a place muſt be ſhewed. So 21 H 6. 19, 20. Bro. 62.

that is, if in truth the defendant were made executor, but never did administer, now it must be replyed that he was made executor at such a place, without speaking any thing of his administring. On the other side if he did administer, but were not made executor, then only the administring is to be replyed; but if it shall be found that the defendant had administration to him commited and so administred by vertue thereof, then is the verdict to passe for the defendant, for this is no administring as executor, and upon a generall deniall thereof this may be given in evidence, as the *Lo. Dyar* reports to have beene resolved. But if the plaintife do in his replication maintaine both the points, shall this make his plea double? Me thinks it should, yet I finde it so replyed, and no exception taken for the doubleneſſe. *Tr. 17. H. 8. Rot.* 28.

So done Co. lib. Int. 144. b.

Mich. 13. & 14. Eliz. Dy. 305.

Lib. int. 322. b.

Tr. 37. Eliz.

A sole woman being executor maketh a deed of gift of the testators goods in trust, but continueth possession of them and marrieth *J. S.* who also hath possession of the goods, and in an action of debt by a creditor fully administred is pleaded: now upon evidence the verdict shall passe for the plaintife; for this alienation being fraudulent was void as to all creditors, and so as to the plaintife the goods continued the testators, and so assets in the defendants hands, as was held in the Kings Bench. If fully administred be pleaded where the defendant hath assets for part but not sufficient for all,

all, and ſo it is found, yet ſhall not judgement be given for the whole, but for part preſently with a further award, that when more ſhall come to the executors hand, the plaintife ſhall then have further judgement for the reſt, ſo as that falſe plea doth him no prejudice, but makes him in as good ſtate, the charges of triall excepted, as if he had confeſſed himſelfe to have part. And I think the plaintife upon that confeſſion of part may pray the like judgement without maintaining that the defendant hath ſufficient for the reſt; for if that be not true, why ſhould he be put to the charge of a triall by Jury: yea Sir *Edw. Cooke* at the Barre *Tr.* 36. *Eliz.* ſaid, that where fully adminiſtred is pleaded, the plaintife is not tied to maintaine the contrary, but may preſently pray and have judgement to recover it when aſſets ſhall futurely come to the defendants hands, which was denied by ſome; but truly me thinks the law ſhould be as he ſaid as well as in the former caſe, where for the part which the defendant had not aſſets to pay, it ſo was done upon verdict ſo finding. But there, as I conceive, it was not a preſent judgement, but an award that he ſhould have judgement futurely; ſo as after whē aſſets come to the defendants hands, the plaintife muſt have a *Seire facias* againſt the defendant, to ſhew cauſe not why he ſhould not have execution, but why he ſhould not have judgement as I take it, yea where it is found for the defendant, that he hath fully adminiſtred,

Yet Finch. 46. E. 3. f. 9, 10 held the contrary, *viz.* that judgment ſhould be of the whole, but execution onely for ſo much, & a Sci. fac. for the reſt when more aſſets.

See Co. lib. 8, f. 134.

ministred, yet was it held by all the Justices, 33 *Hen.* 6. 23, 24. and by *Prisot* 34 *Hen.* 6. 24. that when assets after come to his hands, the plaintife shall have a *Scire facias* to have satisfaction out of them, but there *Markham*, *Yelverton*, and *Fortescu*, were of contrary opinion, and so was the whole Court, 4 *Hen.* 6. *fo* 4 And it stands with great reason, that where upon a verdict fully found against the plaintife, judgment is given *quod nihil capiat per breve*, there he cannot have any writ to execute the judgement for him, but is put to a new action of debt; yet where it is found that the defendant hath assets for part of the debt, but not sufficient for the whole, there it is very congruous that the plaintife have presently judgement for part, and after when more commeth, then by *Scire facias* against the defendant obtaine judgement and execution for the rest; for here both verdict and judgement were for the plaintife against the defendant, whose plea, that he had no goods, was false, and so found by the jury. And this difference was strongly avowed by Serjeant *Hanham*, *Mich.* 33. 34. *Eliz.* and after approved by *Fenner Iust.* 36. *Eliz.* none contradicting it, yet a book was cited, that the plaintife recovering so much as was found in the executors hands should be amersed for the residue, which *Popham* Chiefe Iustice denied to be law.

So 19 H. 6. f. 37 8. E. 4. f. 24. See judgement so entred. Co. lib. Intr. 151. b.

So 7 E. 4. f. 9.

It is 21 H. 6. 40, 41.

Chap. XVI.

Where judgement ſhall be againſt the Executors owne goods, though no plea of the defendant nor vaſtation do ſo occaſion, and of the ſeverall manners of judgement in ſeverall caſes.

HOw by waſting, called by us commonly, a *Devaſtavit*, an executor may draw down the execution upon his owne goods, hath formerly beene handled and diſcourſed of, as alſo what kinde of pleas doe make the executors owne goods liable to the debt, and what not. Now let us ſee where without miſ-adminiſtring or miſ-pleading, yet the nature of the action ſhall lay the whole debt or thing recovered upon the executors owne goods. And this we ſhall finde in ſome few caſes, 1. Where an executor is ſued for rent behinde after his teſtators death, upon a leaſe for yeares, made to the teſtator, and by him left to his executor. Here it ſhall be adjudged and levied upon his owne goods, for that ſo much of the profits as the rent amounted to ſhall be accounted as his owne goods, and not his teſtators, therefore is he to be ſued as well in the *debet* as the *detinet*, where in other caſes he is not, but in the *detinet* only being ſued as executor. So if any thing

delivered to or detained by his teſtator come to his hands, and he ſtill detaines the ſame after the demand, and be thereupon ſued in an action of detinue, for this is his owne act, nor in this caſe need he to be named as executor, for he ſhall not anſwer damages for his teſtators detaining. So if he aſſume to pay a debt of his teſtators having aſſets, and be ſued upon this *Aſſumpt.* the which debt is to be recovered in damages, and that upon or out of the executors owne goods, yet is this action and the aſſumption which is the ground thereof founded in the executorſhip and his having aſſets, for if either he had not beene executor, or if he had not aſſets at the time of the promiſe, it had beene *nudum pactum*, and would not have bound him nor given good cauſe of ſuit. Nay to go further, in the caſe of aſſumption by the teſtator, and ſuit againſt the executor, thereupon we finde the judgement in M. *Plowdens* Commentary given againſt the executor generally, as if he had not beene an executor, not fixing it upon the teſtators goods, yet there the very debt it ſelfe is included in the damages. But contrarily was it after in the ſeventh yeare of the late King, *viz.* judgement given, that as well the damages as the coſts ſhould be levied of the teſtators goods, if ſo much in value of them were in the defendants hands; and if not, then the coſts only of the goods of the executor. And this ſurely is the righter and more juſt way, for there is no reaſon, that upon

5 Mariæ fol. 182.

Reade & Norwoods caſe.

Co.lib.Intr.fo. 1,2.

on a promiſe, more then upon a bond, the law ſhould caſt the whole debt upon the back and ſtate of the executor. But perhaps the two judgements may be reconciled thus, the later was given upon a verdict *non aſſumpſit*, being the iſſue, and there the Iury aſſeſſed damages in certain, *viz.* two hundred fifty three pounds with the coſts. So as here the judgement was compleate and full, *viz.* to recover the ſaid ſumme, but in the other caſe the judgement was had upon a demurrer, ſo as the damages not being knowne, it was generally that the plaintife ſhould recover his damages againſt the defendant, *Sed quia neſcitur quæ damna, &c.* becauſe it appeareth not to the Court what the damages were, therefore a writ was awarded to inquire of damages, upon the return whereof executed, the judgement was fully and compleatly to be given of a ſumme in certain, which ſecond judgement it appeares not by the book in what manner it was entred, and therefore might perhaps bee then agreeable with the other. And that the ſaid firſt judgement before damages inquired of is not a plenary & full judgement, but an award of judgement hath beene divers times reſolved, and that therefore any defect and inſufficiency in the declaration may be ſhewed time enough after the firſt, and before the ſecond judgement. Yea if the plaintife dye before the ſecond judgement, though after the firſt the action falleth to the ground: So if the defen-

Tr. 30. Eliz. Paſc. 33. Eliz. in com. banc.

dant dye, otherwiſe of death after full judgement. But this notwithſtanding, and howſoever it there were done upon the ſecond judgment, me thinks it were righter and fitter that the firſt judgement ſhould expreſſe that the damages ſhould be had and levied out of the teſtators goods, for whom and in whoſe right the executor is ſued.

So for rent behinde ſince the teſtators death. Co.lib.5.fo.31 the ſuit is in the debet as for his own debt. M.14.& 15. Eliz.

Another caſe there is wherein the judgment muſt be as it ſeemes againſt the executors own goods, *viz.* in an action of covenant for a breach of covenãt ſince the teſtators death; for ſo was it held both by all the Judges of Common Pleas, except the L. *Dyar*, and by the pregnotaries in the late *Queenes* time, where the caſe was of an houſe upon the leaſe negligently burned in the executors time, for which damages only were to be recovered. And ſometimes where the executor himſelfe is ſo to beare the burthen, I finde the judgement entred that the ſumme recovered ſhall be levied of the lands and goods of the executor.

Lib.Intr.329.a. & b. De terris & catallis, &c.

Chap. XVII.

Of women covert Executors.

THere being two kinde of perſons who have ſome diſability upon them, *viz.* *Femme* coverts or married women and infants, touching whom we find in many places

ces queſtion and diſceptation in our booke: We will conſider of them by themſelves, or apart from others, yet not joyning them together neither, but each by himſelfe ſeparately.

Firſt therefore of *Femme* coverts, touching whom we will conſider theſe three things.

Firſt, whether they may make Wills and executors with or without their husbands aſſent, and how, where, and in what caſes. 1.

Secondly, whether they may be made executors without their husbands aſſent, or how their husbands may hinder it. 2.

Thirdly, what acts in execution of the executorſhip they may doe without their huſbands, or their husbands without them. 3.

A woman married, or femme covert, wee know is *Sub poteſtate viri, cui in vita contradicere non poteſt*, as ſaith the writ given by the Law to the wife for recovery of her land after her husbands death, being aliened by him. Therefore it is that Judges, when a woman is to acknowledge a fine of any land, doe examine her apart from her husband, to know whether ſhe bee willing, or come to doe it by the compulſion of her husband: It is therefore hard for her to have freedome of will, and conſequently freedome to make a will. Beſides, all her moveables or goods perſonall, which ſhee had at the time of her marriage, otherwiſe than as executrix or adminiſtratrix, are by the Law totally deveſted out of her, and ſetled in the husband as fully *ipſo facto* upon the very marriage, Sect. 1. *Sola & ſecreta examinata.* Debts except which are not properly good.

marriage, as any other that were his owne before: Of theſe therefore ſhe can make no diſpoſition, no more than of other her husbands goods. But in caſe ſhee doe by will bequeath them, although the will and gift be void, yet if the husband, as the caſe was in the time of *Edw.* the ſecond, do after his wives death conſent to this her will & gift, by delivering of the goods bequeathed after her death, or aſſenting that the legatee take them by vertue of ſuch will and gift; this amounteth to a new gift by the husband. If a woman have a leaſe, an eſtate by extent, a wardſhip, the next avoydance of a Church, or other chattell reall; theſe are not deveſted out of her into her husband by marriage, but in caſe ſhe over-live him, they continue to her as before, no alienation or alteration having been made by the husband, who had power to diſpoſe of them by gift in his life-time, though not by his will; yet ſuch a woman in her husbands life-time could not of or for theſe things, without her husbands aſſent, make an executor or will, but ſhe dying before him, they would, by the operation of law, accrue to him. And here then obſerve a caſe, though not frequent, yet full of miſchief when it happens: Suppoſe that a woman indebted a thouſand pounds, and having leaſes and moveable goods to the value of three thouſand or foure thouſand pounds, marrieth with *I.S.* and then dyeth before the debt bee recovered againſt her: in this caſe the husband ſhall have

5. Ed. 2. Fitz. deviſe. 24.

and

and goe away with all this value of his wife, and is not in law lyable to pay one penny of her debts, becauſe hee is neither her executor nor adminiſtrator: What the Chancery could doe, or rather what the Lord Chancellor or Lord Keeper would doe in this caſe, I will not take upõ me to ſay or determine. Another ſort or kind of goods, or rather intereſts a woman may have, *viz.* debts or things in action, which as the former are not deveſted out of her by marriage into her husband, nor yet can ſhee thereof make an executor without her husbands aſſent, although they be one degree farther from the husband than the ſaid chatels realls, for that though the husband doe overlive the wife, he ſhall not be intitled to them as to the former: But if his wife make him executor, as ſhe may, or if after her death hee take adminiſtration of her goods, then as he is thereby intitled to them, ſo is he lyable alſo to pay her debts out of the ſame, when he ſhall have received them.

During her life hee is, but not after.

But the husband may receive them, or releaſe them.

12. H. 7. f. 22. The husband was ſued in Spirit. Court. as executor to his wife.

Laſtly, *Dale*, that a woman covert is executrix to ſome other perſon, and in that right hath goods moveable; theſe are not deveſted out of her, becauſe ſhe hath them not meerely to her owne uſe, but as repreſenting the perſon of another: But whether then may ſhe without her husbands licence or aſſent in reſpect of her being an executor, and for continuation of this executorſhip make executors, and conſequently a will or not? Hereabout hath been much

So ſhe is often to former husband, and to father &c.

much diverſity of opinion: Some books generally ſpeake that the wife may make an executor, but ſpeak nothing of the husbands aſ-
39. H.6.f.27. ſent, whether neceſſary or not. Elſe-where we find it mentioned, that if the husband after the wives death countermand (ſome bookes falſe
34. H.8.S-Bro. printed ſay command) the proving of his wives
Teſtamēts 21. will, then it loſeth all force, or becommeth void and of no value: but in this caſe is no mention in what ſtate this wife ſtood *viz.* whether ſhe were executor or not, no nor ſo much as whether ſhe had any thing in action or chatell reall or not, ſo as nothing in particularity can be grounded upon that caſe. But there are
18. E. 4. f. 11. expreſſe opinions that the husbands aſſent is
Vavaſor Inſt. abſolutely neceſſary even in this caſe, ſo as without it the wives making an executor ſhall be meerly void, and conſequently, he to whom ſhe was executor, ſhall now by her death bee dead inteſtate. And of this opinion was *Babington*, chiefe Juſtice in the beginning of *Hen-*
4. H. 6. f. 31. *ry* the ſixt his time: Yet contrary hereunto was the opinion of *Fineux* chiefe Juſtice in the time
12. H. 7. 24. b. of King *Henry* the ſeventh, *viz.* that where the wife is an executor ſhee may alſo make a will and an executor without any conſent or aſſent
Tit. Diviſ. f. 27. of her husband. And to this opinion doth Maſter *Perkins* after conſideration of the bookes on both ſides incline. But ſome will ſay that
Hill. 29. Eliz. in Com. Ba. ſince all this in the late Queenes time this hath been contrarily reſolved, *viz.* in the caſe between *Andrew Ognell* plaintiffe, and *Underhill*

and

and *Apleby* defendants, in the end of which Caſe, it is in expreſſe termes ſaid to have beene then reſolved that a femme Covert or married woman, could not make an Executor without the conſent of her Husband. To this *I* anſwer that this Caſe is to bee conſtrued with relation, *Ad materiam ſubjectam, viz.* to the matter, and point in queſtion, and under conſideration; which was that ſtate of a woman whereof wee have before ſpoken, *viz.* one having things in action debts or duties to her belonging, as there in particular it was arrearages of rent due to the woman before marriage. As for the point of a woman executor to another perſon, it was never in that Caſe, under diſceptation, no nor once mentioned in the debate or arguments thereupon. Now conſidering the very forme, and phraſe of judgements at the common Law, which are thus, *viz.* *Ideo conſideratum eſt per Curiam, &c.* not *Adjudicatum eſt*, that is, it is conſidered by the Court, not in expreſſe termes, that it is adjudged: This *I* ſay well obſerved (as to mee it ſeemes very remarkable) gives us to know that no more is adjudged then is conſidered of, the judgement being contayned, and claſped up in the word *Conſideratum eſt*. VVherefore ſince in *Ognells* Caſe, the point of a woman coverts ability in Caſe where ſhee is an Executor; To make a will, and Executor hath not beene conſidered of the eyes, tongues, nor thoughts of the Judges, being not once ſet up-

Cooke lib. 4. 51. b.

on it ; It cannot bee, that that point is there resolved or adjudged. Besides, even in a few words expressing as to mee it seemes, the reason of that resolution, it appeares not to have beene the intent of the Judges, that the same should reach or extend to this Case, of a woman covert executor: for it is added (as the reason of the judgement in my conceiving) that the administration of the wives goods doth of right belong to the husband, which amounts to this in my understanding, *viz.* that where the wives making of a will, and consequently of an Executor, may bee prejudiciall to her husband, and prevent him of some benefit or advantage, or tend to his losse, and disadvantage, there it shall not bee avaylable or effectuall without his assent, and therefore not in the Case of her, who having debts or duties to her due, would by making another to bee her Executor exclude or preclude her husband from that benefit, which to him should pertaine as administrator of her goods. Now as for the goods debts or credit to her as executor to some other pertayning no benefit could redound to the husband, by having such administration of his wives goods, for those should goe, and bee to the next of kinne of the wives Testator taking administration *De bonis non administratis* of him, if shee have no Executor, & therefore her making an Executor as touching these brings no hurt nor prejudice to her husband, and so is out of the reason

of

of *Ogwells* Case. Since then it is so, and since the Law favoureth wills, and it was by implication part of his will who made her Executor, that shee should have power to continue his Executorship by making another to succeed thereinafter her decease for performance of his will; why should the Law give to the Husband who can receave no prejudice thereby, power to give impediment thereunto; for *Frustra est inutilis potentia*, even reason it selfe frames, and awards against him in this Case a *Quare impedit*, or rather a *Non impediet*, as to mee it seemes. Wherefore to conclude, *I* take it that the opinion of *Finux* is good Law in that point of a feme covert Executor, though not in the other point, where shee onely hath debts, or things in action to her selfe due, for therein the said resolution in *Ogwells* Case, grounded upon good reason, gives mee satisfaction to differ from *Finux*, who making no difference betweene the cases held the Husbands assent needles in both. *Posito* then that the wife of *I. S.* having debts due to her selfe, and being also Executrix to *I. D.* makes without her husbands assent, *L. N.* her executor, and dyeth, what shall wee now say? shall wee say, that as touching the goods, and credits, or things in action to her as executrix of *I. D.* pertaining this will stands good, and *I. N.* as her Executor may prove it contrary to her husbands will, and that as to the credits to her selfe in her owne right pertayning, the will is voyd,

voyd, & thereof her husband may take administration? Shall she dye both testate, and intestate with a will, and without a will? shall shee have both an executor, and administrator? why not? to severall purposes aswell as where an executor is made onely for one particular thing or one place, the Testator may elsewhere dye intestate: and so where the executorship is divided as before is shewed, and one to whom part is committed will prove the will, but the other to whom other part of the executorship is committed will not take it upon him, here must needs bee a dying for part testate, and for part intestate.

Note.

As for the second point, *viz.* wives or women coverts being made executors, and so having the office of executorship put upon them against their husbands will, there hath also beene diversity of opinions. In the time of King *Edward* 1. *Brab.* Justice saith shee may executor without her husband, and the administration shall bee delivered to her onely. And I thinke he meant that this might bee without the consent of her husband or whether hee would or not, for so is it said in the time of King *Henry* the seventh to bee the Law spirituall, and indeed in Courts spirituall no difference is made betweene women married, and unmarried, for ought I can finde: there a wife sueth, and is sued alone without her husband; hee intermedleth not, nor is intermedled withall touching the things pertaining to his wife.

13. Ed. 1. Fitz. Exec. 119.

2 Hen. 7. 15. b.

wife. But at the common law it is otherwiſe, and there as *Bryan* Chiefe Juſtice ſaith, a wife without the aſſent of her huſband cannot be executor, he meaning thereby that the husband may oppoſe and hinder it: for ſuch an one may be named executor in and by a Will without the knowledge of her huſband: let us then ſee how after the death of the teſtator, the huſband can hinder her proving of the will or intermedling to adminiſter, ſince it may be a matter both of much trouble and danger to him, to have the executorſhip faſten upon his wife, and conſequently upon himſelfe. On the other ſide, it may be a benefit and advantage to the huſband, and therefore we will alſo conſider, whether the huſband may (though his wife would refuſe) aſſume the executorſhip and faſten it upon her. The teſtator therefore being dead, and fame or common bruit carrying it to the Ordinary, that the wife of *I. S.* is made executrix, if ſhe come not in gratis, or voluntarily to prove the Will; *Proces* or a citation is to be ſent out of the Spirituall Court againſt her, to enforce her comming in to take on her the executorſhip. She comming may cleerely, as well as any other perſon (eſpecially if her huſband concurre with her therein) refuſe this office, truſt and charge, ſo as if there be no other executor named, the Ordinary muſt commit the adminiſtration: If ſhe ſhould not come and appeare, ſhe ſhould be excommunicate as I take it, notwithſtanding any al- 2 H. 7. 15.

legation or intimation by her husband of his unwillingneſſe to have her take upon her the executorſhip. But ſuppoſe ſhe doth come into Court and offers her ſelfe ready to take the executorſhip upon her, and on the other ſide her husband expreſſeth his diſaſſent thereunto, praying that ſhe may not have the execution of the Will to her committed, what will then be done? This I confeſſe pertaines to another learning, and not to that of our profeſſion: but forasmuch as I find that in the Courts ſpirituall a wife ſtandes in the ſame plight and ſtate as a woman ſole, the husband not intermedled withall in the affaires of the wife; Therfore do I conceive that in that Court, the husbands refuſall wil not be of force to hinder the committing of the executorſhip to the wife not refuſing, at leaſt if there come not a prohibition to ſtay the Spirituall Courts ſuch proceeding: but whether a prohibition be in ſuch a caſe to be granted or not, as I find no reſolution in my books, ſo wil I not take upon me to reſolve. This ſtands cleere in the rules of the law of *England*, that the wife is under the husbands power, and cannot contradict him in pleading and doing other acts even touching her own Freehold: nay ſhe cannot take lands nor goods by gift or conveyance, without her husbands aſſent, as the law hath been, and for ought I know is taken. But if once the Will be proved, and the execution thereof committed to the wife, though againſt her husbands mind

33 H. 6. 31. 43.
39 Ed. 3. 1.
27 H. 8. 24.

and

and conſent, I think it will ſtand firme, and the huſband and wife being after ſued cannot ſay that ſhe was never executrix, and I doubt whether the wife adminiſtring without the husbands privity and aſſent, although the will be not proved, do not conclude her huſband as well as her ſelfe, from ſaying after in any ſuit againſt them, that ſhe neither was executor, nor did ever adminiſter as executor. Yet perhaps this adminiſtration by the wife againſt her huſbands minde, will as againſt him be as a voide act, elſe cannot I ſee how *Brians* opinion before cited, *viz.* that the wife ſhall not be an executor, without or againſt her huſbands mind, can be law. On the other ſide if the husband of a woman, named executor, would have his wife to take upon her the execution of the Will, and to prove the ſame, but ſhe will not aſſent thereunto (wiſhing perhaps that gaine and benefit rather to ſome of her kindred by way of adminiſtration then to her owne husband by her executorſhip: as ſometimes wives accord not well with their huſbands) in this caſe I think the Court Spirituall will not faſten the executorſhip upon the wife againſt her will. But *dato*, that the huſband though the Will be not proved, doth adminiſter as in the wives right, but againſt her minde and will, ſhall ſhe be now hereby bound and concluded, ſo as after ſhe cannot decline or avoid the executorſhip: and ſurely I think that during her husbands life, ſhe ſtands concluded at the

18 H. 6. 4. The plea is that the femme did or did not adminiſter without ſpeaking of the husband.

33 H. 6. 31. The husband may adminiſter and prove the will for his wife.

the common law, for that there ſhe ſhall not be, nor can be ſued alone as executor, and then being ſued with him ſhe muſt joyne in plea with him, *viz.* that ſhe neither was executor, nor adminiſtred as executor, and then this act of her husbands given in evidence, will as I take it, cauſe that the verdict be found againſt her, not ſo after her huſbands death: then ſhe may refuſe, as the Lord *Dyar* ſaith, and citeth as reſolved. Theſe things I thought good to offer to conſideration, and ſo leave them without reſolution. Difference perhaps may be, where a woman ſo made executor taketh an huſband after the teſtators death, before either proving or refuſing to prove the Will, and where ſhe is made executor during the coverture, as there is in caſe of a diſcent of her land to the heire of a diſſeaſor; for when there is upon her ſuch a ſtate of election, ſhe marying before her reſolution or determination, doth upon the matter deliver it into the huſbands hands: not ſo where it firſt findeth and falleth upon her in the ſtate of coverture: if the huſband were indebted to the Teſtator, this making of the wife executor is as I take it, a releaſe in law, as well as if ſhe were the debtor, but if after the teſtators death ſhe do marry ſuch a debtor, it is a devaſtation.

1. El. Dy. 166. b. there is cited 3 H. rot. 112. Nota per Bill.

The

The third Point.

Touching the adminiſtration or execution of the Office of executor by a Femme covert and her husband.

WE will now come to admit the execution of the will aſſumed by concurrent conſent of huſband and wife, and the will proved with both their likeing in the wives name, and examine what acts the wife of her ſelfe is able to do, and what her huſband without her.

It hath beene conceived by many of old, and by ſome of late, that if a Femme covert or maried woman executrix releaſe a debt of her teſtator, or give away the goods which ſhe hath as executor, or deliver a legacie bequeathed, it was firme and good, and on the other ſide, that her huſbands gift or releaſe was of no value, for that the adminiſtration or execution of the will is committed to the wife only, and ſome have gone ſo farre as to ſay that ſhe may ſue or be ſued without her huſband (in the Courts of Common Law, I meane, for in the Spirituall Court it is true the huſband is not joyned with the wife in ſuit) but the law is doubtleſſe in all thoſe points contrary, as not only ſome opinion alſo was of old, *viz.* in the time of *H.* 7. but alſo hath beene in the late *Queenes* time reſolved, for otherwiſe, if the wives gift or releaſe ſhould ſtand good, her act

7 H. 4. 13.

See 18 H. 6. 4. In det the plea ſhall bee that ſhe hath fully adminiſtred &c replic. that ſhe hath aſſets, never mētioning the husband.

might exceedingly endamage her huſband, and make his goods lyable to the creditors, the teſtators ſtate being waſted by the gifts or releaſes of his wife. Wherefore it was held in the ſaid late caſe, that unleſſe due payment were made to ſuch women covert executors, their releaſes or acquittances be void, and ſo alſo their gifts and grants: yea it was then held that the husband of the wife executrix, may give goods or make releaſes of debts at his pleaſure. But doubtleſſe by mariage, neither are the goods though perſonall which the wife hath as executor, deveſted out of her and ſetled in her husband as her own goods are; nor if ſhe dye, ſhall they acrue to the husband, if no alteration were of the property, but ſhall go to her executor or to the next of kin being adminiſtrator of her teſtator if ſhe have no executor, and ſo was it held in the firſt yeare of Queene *Mary:* Yea though for any other goods which the wife had in her owne right before marying, the husband alone without naming the wife may maintaine an action of treſpaſſe; yet touching ſuch goods as the wife hath as executor the action muſt be brought in the names of the husband and wife to the end that the damages thereby recovered may accrue to her as executor in lieu of the goods. So alſo muſt the replevin for thoſe goods be in both their names. But although the husband be thus named with the wife, yet principally is it the ſuit of the wife, and therefore in ſuch actions or in debt

33 H.6.31.

M. 31. El. in com. b. If the husband be to avow, it muſt be in the right of his wife executor or adminiſtrator. Manſilds caſe.

debt by husband and wife, ſhe being executor, if it come to triall by Jury, the husband being an alien, yet ſhall he not have triall *per medietatem linguæ* or *alienigenarum*, that is, by halfe aliens, as in other caſes: Caſes where an alien is party to a ſuite is to bee had. And whereto a wife made executor, power is given to ſell land of the teſtators; ſhee may ſell to her owne husband, as was reſolved in the time of King *Henry* the ſeventh, where the Feoffees (it being land ſetled in uſe) were committed to the Fleet, for that they would not execute an eſtate to the husband, according to the wives ſtate. But of this I much marvell, ſince the Law intends the wife ſo under the husbands command and ſubjection, that it holds not her diſpoſition of land to him by will free, nor therefore of force, and how ſhall this then be conceived to be but a partiall ſale; yet *volenti non fit injuria*, and he that will put ſuch power into the hands of a woman under coverture, doth in a manner ſubject it voluntarily to the husbands will. And it hath been held by ſome, that even an infants or femme coverts conveyance in ſuch caſe of neceſſitie ſhould ſtand firme and unavoydable, becauſe of the condition expreſſe or implied, that the ſtate ſhould bee void, if no ſuch conveyance made.

Doctor Julio his caſe.

10.H.7.20.

Bro. Juſt. Cui in vita 15. Shee may ſell to any other, but not to him.

Fenner Juſt. in ba. reg. Paſc. 37. Eliz. & 34. E. 3. Bro. Cui in vita. 15.

No prejudice to them that it be good.

Touching infants, and their making or being made executors.

BEing now to conſider of diſability by age, for want of yeares in perſons making or being made executors: Let us firſt take view of the ſeverall ages of men and women to ſeverall purpoſes materiall in the lawes judge-
1. ment and reſpect. And firſt, touching a wo-
35.H.6.41.b. man: *Wangford* in *Henry* the ſixth his time ſhewes, and other books approve that ſhe hath ſixe ſeverall ages, reſpected in and by the law. As firſt the age of ſeven yeares, for her father to have aid of his tenants to marry her.
2. Next nine years to deſerve dower, that is, that in caſe ſhe be of that age at the time of her huſbands death, ſhee ſhall be endowed, but not if ſhe be any thing under thoſe yeares; the Law being Phyſically informed that a woman at thoſe yeares may conceive a child, but not under them. But of ſomewhat different opinion was, as it ſeemes, the Parliament in the late
18. Eliz. cap.7. Queens time, when it was made felony to have unlawfull carnall knowledge of any woman child under the age of ten yeares, it being then conceived, as I thinke, that no ſuch could conſent.
3. The age of twelve yeares is a womans time for aſſenting or diſaſſenting to marriage in more tender yeares had. For ſo it appeares by divers bookes, although Mr. *Littleton* have here

here no distinction between male and female.
The age of fourteen years is a womans time to 4.
be in wardship or not, so as if she be any thing
above those years, at the time of her ancestors
death, she escapeth wardship. The age of six- 5.
teene yeares is her time of comming out of
wardship, being once fallen under it, for al-
though had she beene full fourteene, she had
escaped it; yet not so being at the time of her
ancestors death, her wardship lasteth till six-
teen yeares, except the Lord shall sooner mar-
ry her. And lastly, the full age of a woman 6.
whereby she is inabled firmely and unavoida-
bly to make grants or conveyances is one and
twenty yeares, as well as for the male, before
which time, be it that she being sole, make a
feofment or other conveyance, or being mar-
ried alien her land by Fine, and her husband of
full age joyne with her, yet is it infirme and a-
voydable.

Now of the male, or man, the first age ma- 1.
teriall and setledly resolved on, is twelve years,
for at that time each male is at the Leet to
sweare his fidelity to the King; this women doe
not, and therefore are they never said to be
outlawed, but to be waived, because they have
not this admittance into the Law which males
have. This hath been, as I think, the ground
of that speech, That women are lawlesse
creatures.

The second age of males is fourteen yeares, 2.

accounted by the Law, the age of diſcretion, eſpecially materiall to two purpoſes, *viz.* Firſt, that if one under that age commit an act amounting to felony, yet is he to ſtand free from the attainder and puniſhment incident to a fellon: Regularly it is thus, but *non eſt regula quin fallit*, one of much leſſe yeares having attained ripeneſſe of diſcretion and diſcerning, ſhall incurre the like attainder as one of full age, as
3. H. 7. f. 1. 6. was reſolved in the time of King *Henry* the ſeventh, touching an infant but of the age of nine yeares, who having killed another boy of like age with his knife, and then hiding the ſlaine boy, and excuſing the blood found upon him, by ſaying that his noſe had bled: It was held by the Judges that he was to be hanged as a fellon, his ſuch non-age notwithſtanding. The other point, touching which, this age of fourteen yeares is eſpecially materiall, is touching an heire of lands held by ſocage; for in caſe ſuch heire be under that age, he is to be in ward to the next kin, but if he be of that age, he is not to be in ward at all, for that the law judgeth him to be of diſcretion at thoſe years, and therefore a Guardian in Socage being in effect but a Bayliffe accountable, hee hath no need of ſuch an one, other than ſuch as himſelfe ſhall chuſe.

3. The third age in and touching males materiall is fifteen yeares; for every Lord of a Manour; or one having Freeholders in Socage, or by

by Knights Service, when his eldeſt ſon commeth to that age, *viz.* fifteen yeares, is to have of them ayd for the making of him a Knight, towards which every one holding by a whole Knights Fee is to pay twenty ſhillings, and ſo ratably for more, more; and leſſe, leſſe: and each holding twenty pound land in Socage, is to pay the like ſumme, and ſo ratably for more or leſſe.

4. The fourth age of males, is the full age of one and twenty years, which maketh him free from wardſhip, having lands held by Knight-ſervice deſcended unto him: And alſo makes him able to alien lands or goods, makes firme his bond, ſtatutes, recognizances, &c. for although at fourteene the law judge him of diſcretion, yet doth it not hold him fully ripe till one and twenty.

5. Oblitum. Another of 60 to exempt ſiõ being compelled to ſerve by the ſtat. of labourers 23. E. 3. cap. 1. W. 2. cap. 38. 13 Ed. 1. no. ni. br. 165.

The laſt age of males reſpected by the law, is ſeventy yeares, at which time Sheriffes are to forbeare to impanell them in Juries, and in caſe they doe not, ſuch old man may have a writ to the Sheriffe, grounded upon the ſtatute for that purpoſe, made in the time of King *Edward* the firſt, commanding ſuch Sheriffe to forbeare the impanelling of him; and hee may have an action to recover damages upon that ſtatute: This is called by moſt a writ of Dotage, a word, perhaps, anciently taken in a good and favourable ſenſe, *Pro dote etatis, viz.* a gift, privilege, or exemption allowed to age

in

in favour thereof, and as a benefit. Having thus by way of ingredient or introduction taken view of theſe ſeverall ages, let us now ſee wherein and how age is materiall, touching them who are to make or to bee made executors, and what age required thereabout. Maſter *Perkins* ſaith, that one of foure yeares old may make a will, and conſequently executors; and his reaſon is, becauſe the executors being to account before the Ordinary, it cannot be intended but that the goods ſhall be diſtributed for the good of his ſoule: He ſpeakes as if he only made an executor by his will, but did not bequeath any thing, but left all to the executors conſcience and diſcretion, which is not uſuall, though feſible, as before I have ſhewed, or ſaid at leaſt. But admit it were ſo, and no bequeſt at all contained in the will, yet ſince at that age an infant hath no diſcretion to elect a fit perſon to diſtribute his goods, money, and other things; no nor to make continuation of an executorſhip to another, to whom perhaps the infant was executor: I cannot ſee that his will ſhould be of any force, but if he be of the age of 14. yeares, being the age of diſcretion, in the judgement of law, then I ſhould hold him able to make a will, although yet he be an infant till twenty one yeares, and can make no gift of land nor goods which ſhall be of force. And *Babington* chiefe Juſtice, to other purpoſe makes like diſtinction betweene an infant of ſuch

Deviſes. f. 97.

No good reaſon, for one may make an ill account; ſpecially having a childes direction for his doings.

9. H. 6. f. 6.

ſuch tender yeeres, and one come to the yeares of diſcretion. So alſo as before wee ſhewed, is it in the Caſe of fellony. And that way alſo ſounds that which *Hanck.* : ſaies in *Henry* the fourth his time, *viz.* that an infant of 18. yeeres old may bee a diſſeiſor ; as implying that his yeeres may bee ſo tender, that as *Candiſh* ſaith of an infant in *Edward* the third his time, hee is not to bee intended able to know or diſcerne betweene good, and evill, me thinkes therefore hee ſhould bee at the leaſt of the age of diſcretion, *viz.* 14. yeeres who ſhould bee able to make a will, and conſequently an Executor. And the cuſtome for an infant of 15. yeeres old to bequeath by will hath as to mee it ſeemes, affinity with this opinion, though there the Caſe was of land in a borough deviſable by cuſtome : and that way reflecteth the Caſe in the time of King *Henry* the ſixth, where it was ſaid that an infant under 15. yeeres of age ſhould not wage his Law, *viz.* take an oath to acquit himſelfe of a debt or excuſe his default in an action reall. And further reaſon of this opinion will ariſe out of the conſideration of an infant made an Executor.

2 H.4.22.

40 Ed. 3.44.

37.H.6.5.

11.H.6.f.40.6.

Now touching an infant made Executor how young ſoever hee bee, the making of him ſo is not voyd, but yet the execution of the will which is the performance of the office of Executor ſhall not bee committed to him till hee come to the age of 17. yeeres by the Law ſpirituall, and till then (for that hee is not

able to doe the part of an Executor,) administration is to bee committed to some other; yet if it bee a woman infant who is so made Executrix, in Case shee bee married to a man of 17 yeeres old or more, now is it as if shee were of that age, and her husband shall have the Execution of the will, and if administration were before committed during the minority of the woman, it shall now cease, as is said in *Princes* Case. Yet *I* doe a little marvaile at these opinions, considering that these things are managed in the spirituall court, and by that Law; and it intermedles not with the husband, in the wives case; now by that Law, and not our common law, comes in this limit of 17. yeers. And *I* have seene it otherwise reported in, and touching this last point.

Co.lib.5.f.29. P.

M.41.&.42. Eliz.

Further touching infants Executors, and under that age of 17. yeeres this is to bee noted, *viz.* that such an one is not able as an Executor to assent to a legacy, so as it may by virtue thereof settle in the legatee. Also if administration bee during such minority committed with speciall words of restraint or limitation, *viz.* that it is done to the use or profit of the infant Executor, then no sale of lease or goods or assent to legacy, by such administrator will bind or prejudice the infant Executor; But otherwise perhaps if the administration during the minority bee committed generally. And if the Testator himselfe, making an infant Executor doe also appoint another to bee his

Co. lib. 5. fo. 29. But payment is to bee made to the Exec. & not to the adm. M. 15. & 16. El. in com. ba. rep 67. Co lib. 5. fo. 29.

Co. lib. 6. fo. 671.

his Executor during his nonage, expreſſing it to bee onely for the benefit, and behoofe of the infant executor, *I* doubt whether this temporary executor ſtand any whit reſtrayned frō what pertaines to the power of an abſolute executor, for there may be perhaps difference between him to whom the owner of the goods commits the government of them, though but for a time, and in ſpeciall manner, and an adminiſtrator ſo ſpecially made by the ordinary, another being preſently by the will of the owner or Teſtator to have the adminiſtration, in whom for a time legall defect is found. But now let us paſſe over this age of 17. and conſider of the infant betweene that time of his being admitted to take upon him the executorſhip, and his accompliſhment of his full age of 21. Firſt, then ſuppoſe that hee doth releaſe a debt due to his Teſtator, whether ſhall this bee good to bind him, and to diſcharge the debtor aſwell as if the executor had bin of full age, hee now having proved the will, and being by the Law ſpirituall approved an able executor. And this point comming in queſtion in *Ruſſells* Caſe, in the late Queenes time, H. 26. Eliz. conſideration was had both of divers good reaſons for enabling of this releaſe, as that an executor repreſents the perſon of his Teſtator, and in his right, and power, doth theſe acts, and not in his owne, and therefore his infancy which is a ſtate or condition of his owne naturall perſon, ſhall no more diſable him then

16.H.6.ret 45. 21.Ed.4.13. 24. it doth the King, a Mayor or other head of a Corporation. Alſo divers Bookes were found to runne that way as well in the caſe of an infant as of a Femme Covert. But upon great deliberation in the Kings Bench, and upon conference had with the Lord *Anderſon*, *Manwood*, and other juſtices, it was reſolved, and adjudged that the releaſe of an infant executor without payment of the debt or duty would not bind or barre him, firſt for that if it should it would be a waſting or devaſting of the goods of his Teſtator, and ſo would charge his owne goods. Secondly, It would bee a wrong which an infant could not doe by his releaſe. Thirdly, It was no purſuit nor performance of the office or duty of an executor, but the contrary: And upon this judgement a writ of error was brought in the *Exchequer* Chamber, where it was agreed by all, that the releaſe was not effectuall nor binding, ſo as this point now had the reſolution of all the Judges of *England*. But it was agreed, that if payment or ſatisfaction had beene made, then the infant executor might have made a good acquittance, and diſcharge, & indeed payment it ſelf if proved, brings diſcharge enough, except in the caſe of a ſingle Bill; Note that the principall caſe adjudged was not of a releaſe of any debt or duty by ſpecialty, but of treſpaſſe in converſion of goods found or taken in the Teſtators life time. But *Poſito*, that this infant had aſſented to a legacy, whether will this binde him or not? for in the

Co.lib.5.fo. 27.

ſaid

ſaid Caſe of *Ruſſell*, it is ſaid that all things which an infant doth according to the office, and duty of an Executor, will ſtand firme; now it is part of his office to pay, and execute Legacies. Yet ſince this act amounts to a vaſtation or waſting of the Teſtators goods aſwell as the other, in caſe there remaine not goods ſufficient for payment of the debts, and conſequently here aſwell as in the other caſe, the infants owne goods would become lyable to his Teſtator debts; I doubt, and incline, that it is not nor can ſtand effectuall, for except in the other wee admit a want or poſſibility of want of aſſets or goods, the releaſe could neither hurt the infant himſelfe, nor doe wrong to any other, and that admitted, this caſe is of like prejudice; yet if this aſſet ſhould bee voyd ſo alſo would bee his payment of Legacies, and how then were hee an able Executor at the age of 17. yes to ſue, and to bee ſued for debts, and Legacies, and if upon ſuit it cannot bee ſhewed that debts will take up all or diſable the payment, then happily hee may bee forced to pay; Quære notwithſtanding whether theſe acts though voluntary ſtand not good upon *Esse eſſe*, or conditionally, *viz.* if there bee beſides goods ſufficient, *&c.* or that elſe the nonaged Executor may have an action of accompt for the money by him payed to the Legatee, and alſo avoyd his aſſent where that only needfull. But doubtleſſe neither the aſſent of ſuch Executor before his age of 17. nor any

payment of a debt to him could bee good, although ſuch acts to or by another Executor, before the proving of the will would ſtand firme, and good: for this infant wants not onely proving, but alſo ability to prove his Teſtators will, yea the will ſtands ſuſpended, and the Teſtator as it were inteſtate, whilſt the adminiſtration ſtands in force, ſo as during that time nothing can bee done by any as executor, and therefore there is great difference betweene the caſes. What if payment of a Legacy bee made to an infant, can hee make a ſufficient acquittance; This *I* confeſſe is beſides the point in hand, yet becauſe it concerns infants, and Executors (though not infant *Executors*) it is not amiſſe here to caſt ſome thoughts, and words upon the point, for that it many times perplexeth both *Executors*, and Legatees. Firſt, therefore in caſe the Executor bee of the yeares of diſcretion, *viz.* 14. *I* hold it cleare that any payment to him made will ſtand good, for that the Law at that age holds him able to governe, and manage his owne Lands held in ſocage, and conſequently to receave the rents thereof, wherefore whether hee who makes ſuch payment have any acquittance or not; if hee have proofe of the payment, hee is well enough acquitted from any ſecond payment, and if without payment hee get an acquittance, it will not ſuffice, the infancy of him who makes the acquittance conſidered. Beſides if the acquittance bee as

moſt

moſt uſually they are, but ſigned onely with the name of the maker, and not ſealed, it is onely an evidence or proofe of payment, and no pledable acquittance, becauſe no deed, ſo as it nothing differs from proofe by wiineſſes, ſave that it is not mortall as they. But now if the infant bee under the yeeres of diſcretion, what ſhall wee ſay to a payment to him ſpecially, if hee bee but three, or foure yeares old or thereabout: heere *I* thinke caution is to bee uſed by the executor generally, and the ſureſt way is, if hee feare to keepe it in any reſpects, to pay it into the Court, where it is recoverable, *viz.* where the will was proved; yet the caſe ſo may be, as that this payment may not bee at all ſafe for the *Executor*. As put the caſe that hee entred into bond or ſtature to pay all Legacies by ſuch a day, to the ſeverall Legatees, heere *I* thinke the payment into the Court ſpirituall ſufficeth not, for that muſt make the receit to be, with ſome charge, which is in ſome kinde an abatement; there *I* thinke therefore legally to ſecure the *Executor*, the payment muſt bee to or in the preſence of the gardian becauſe of noriture, *viz.* him or her who hath (though not as gardian in reſpect of lands) the cuſtody or education of the infant: for otherwiſe to pay it into the hands of ſuch a tender infant ſeparate from any governor, or gardian, were to expoſe it to loſſe, both for that hee is not able to count the ſumme, and for that hee yet not being come to diſcerning yeeres were

Notes of receyt called acquittances.

Quere.

were like with *Esops* Cocke, to part with pearles or coyne for plumes and trifles of no valew. But in case no bond nor other collaterall penalty lie upon the *Executor*, or in Case the Bond or Statute bee onely to performe the will generally which nothing alters the course of payment, which by the will the Law laies upon *Executors*, then is not the Executor put to any such payment, nor need pay without demand, and acquittance, as in case of payment, upon a single Bill, or of a rente secke where no distresse can bee taken, nor other penalty incurred: yet in that Case if demand bee, and acquittance ready to bee given, let the *Executor* take heede, in Case hee bee bound to performance, that hee stand not upon the invalidity of the acquittance in respect of nonage, for as *I* have said, proof by witnesses may supply a nullity of acquittance, and much more the weaknes or imbecillity, payment according to the testators appointment being the matter wch acquitteth the payer, and this the *Executor* may have testified under the hands of divers witnesses expressing circumstances, so as all dying may continue safely from second payment as well as an acquittance, the witnesses whereunto are subject to mortality, as well as the other. But herein Courts of equity doe often interpose helpfully for them who seeke not evasion from payment, but only security in paying. And of infant executors, and by occasion thereof, of infancy in Legatorees, or Legatees, thus much.

Of

Of Legacies.

ALthough theſe be not recoverable at and by the Common Law, but moſt naturally at and by the Law Eccleſiaſticall, yet by ſuits in Courts of Equity, as the Chancery and Court of Requeſts, they are often obtained, and of many things touching them the Common Law taketh notice, and hath manifold occaſions ſo to do: we will therefore conſider thereabout theſe parts or points, ſome whereof have beene in part before touched upon other occaſions.

Whether any legacy in certaine & lying in prender, may be taken, or had, without the executors aſſent by the legatee, or him to whom it is bequeathed? 1.

When an executor can, or ſafely may pay, deliver, or aſſent to a legacy? 2.

Whether one executor alone may do it, and what if the executor be an infant or woman covert? 3.

What ſhall amount to an aſſent of the executor, and What to a diſaſſent or diſablement of aſſent? 4.

How a leaſe or chattell reall may be given to one for a time, with remainder to another, how not. 5.

Where an aſſent to the firſt or one part of the bequeſt ſhall imply or amount to an aſſent for the reſidue. 6.

7 Of the manner of assents and therein of assents conditionall.

8 What manner of interest he in the remainder of a lease after the death of another hath during the life of that other, and whether he may dispose of it during that time, and how?

9 Whether this remainder can be defeated by any act of the devisee for life, or by the death of him in remainder first?

10 By what acts or accidents a legacy may bee forfeited or lost, and therein of revocation, death before, &c.

11 Whether the executors assent shall have relation to the testators death, and shall make good a graunt by the legatee before made.

If the executor give it to another, the legatee hath no remedy at the Common Law per Prisot. 37 H.6.30.

As for the first, we have before shewed the assent of the executor to be necessary before any legacy can be had, for that debts are first to be paid, and that the executor is to look to at his perill. But hereto adde a little out of M. *Swinborne* a learned Civilian, who saith, that in case any goods be in the hands or custody of *J. S.* and the owner doth bequeath them to him, then may he keepe or retaine them against the will of the executor, so as there be other sufficient goods in the hands of the executor for payment of all debts: but though thus as it seemes would it stand in the Ecclesiasticall Law, yet for that no property is transferred to the legatee without the executors assent, therefore doubtlesse the executor may at the Common law recover the thing with-

with-held, or damages to the value againſt the legatee detaining it. Another caſe there is, wherein as the learned Civilian ſaith, the legatee may take the thing to him bequeathed lying in prender, *viz.* Horſe, other beaſt or peece of Plate, or other like thing knowne and in being, and that is where the teſtator doth expreſly ſo appoint by his will. But herein doubtleſſe the Common law, at and by the which debts are recoverable againſt executors will oppoſe the law Spirituall, for elſe by ſuch appointment the teſtator might cauſe that all his goods ſhould be taken by legatees, and that none ſhould remaine to pay debts. Yet if there be other goods beſides ſufficient for payment of debts, then indeed I ſee not how the executor can hinder ſuch taking without violating his oath taken for performance of the will. If any ſay that it is alſo a breach of oath in the other caſe, I ſay he obſerveth not that there that clauſe in the will being againſt the law is void, and conſequently there is a nullity upon it, and it is as if no ſuch thing were in the will, and ſo the oath extends not to it. And as a chattell ſhall not be transferred to a ſtranger without the executors aſſent; ſo if the deviſee be to the executor himſelfe, till he elect to take as legatee, it ſhall be in him as executor, as appeares by the ſtraine and argument of two caſes in *Plowd.* Comment. and more lately in the Kings Bench, the point being divers dayes argued was at laſt ſo reſolved by three Judges againſt

Welcden and Elkington. Paramour and Yardley. Portman and Simmes case. Trin. 37. Eliz. All but Gawdy so agreed.

one: and the reason of *Coke* at the Barre was very good, for here the executor sustaines two persons, *viz.* an executor, and legatee, and so all one, as where the bequest is to another, for *Quando duo jura concurrunt in una persona, æquum est ac si essent in diversis.*

As for the second point, it may have these two parts: 1. When the executor is able to give such assent to a legacy. And 2. when he may do it with safety. As for the first, he is able before probat of the will to assent unto the execution of a legacy, as elsewhere is shewed, and that although he be not of full age of 21 yeares; but if he be under 17 yeares, so as he is not able to take upon him the office of an executor, and therefore administration is during that time to be committed to some other; Here his assent is not of force or effectuall, as wee find in *Princes* case to have been held in the case of *Pigot* and *Gascoine*. As for the second part, till all debts be payd, the executor may not safely consent that the legatee enter into the lease or chattell devised, no more then he may pay money bequeathed, if there be not sufficient also to pay all debts. Of these things more is said elsewhere. Yet because the reader or he that desires direction in these points will look for them under this title, I thought not good here to be altogether silent touching them.

21 Eliz. D. 367

Co. lib. 3. fo. 29

As for the third point, *viz.* Whether the assent of one executor where there be many, be sufficient,

ſufficient, I ſee not how to doubt, ſince any one executor may give away any goods of the teſtators, or releaſe any debts due to him, therefore much more aſſent, which is no more or greater work in effect then an atturnment of one leſſee upon a grant of a reverſion. And if there want to pay debts, he only who aſſented ſhall anſwer for it of his owne goods, and not his companions. But if this executor be either under the age of 17 yeares, or under coverture, viz. a woman maried, ſuch is not able to give a good aſſent to binde the others, no not themſelves, for then thereby the Infant might draw a debt upon himſelfe, and the wife upon her huſband, by aſſenting to or paying of a legacy, there not being ſufficient goods to pay all debts. But the huſbands aſſent is ſufficient where the wife is executor, for his acts whom ſhe hath choſen to be her head, may prejudice as well her as himſelfe; yea though ſhe were within age, yet he being of full age, his aſſent will ſtand good. But if he or another executor in his own right be above 17 yeares of age and under 21, I doubt whether now his aſſent will be ſufficient, at leaſt except the caſe be put that there be aſſets ſufficient, which perhaps there may be materiall, though not in the other. See more hereof after in the title of women covert, and Infants executors.

6 H. 7. 5. If the bequeſt be to one of the executors, he may take it without aſſent of his compan. yet if a det, his compan. may releaſe it. 48 E. 3. 14, 15.

So held where but one of the executors during nonage aſſented, in the caſe of Rhetorick and Chappel. H. 9. Jacobi. Ror. 895. in ba. reg. C.

As to the fourth point, firſt there may be an aſſent & election implyed, as well as expreſſe, for if in the deviſe or bequeſt the legatee be

be appointed to do ſome act as in reſpect of the legacy, and the excecutor doth accept the performance thereof, this amounteth to an aſſent. So if the deviſe be to an executor for the education of ſome children which he doth accordingly educate, this makes an election to have the thing by way of legacy, and not as executor, as appeares by the caſe of *Paramoor* and *Tardly*, *Plowd.* 543. So if an horſe be bequeathed, and one offering to buy him of the executor himſelfe, he directeth him to go and buy the horſe of the legatee; or if the executor himſelfe offer money to the legatee for the horſe, this implyeth an aſſent that it ſhould be the legatees by the will, and ſo was it held in the caſe between *Low* and *Carter*, where the deviſee of a terme did grant it to the executor, and this acceptance of a grant from him was held to imply the executors aſſent that it ſhould be his to grant. But I ſee not well how that ſhould be law, which in the latter part of the Lo. *Dyer* is found, *viz.* where a terme was deviſed to *I. S.* and he was made executor, and after the death of the teſtator entred and occupied the lands a whole yeare without proving the Will, that this was an election to have it as deviſee and not as executor. For firſt he had good right to the terme as executor before probat, and ſo might clearly in that right have taken the profits, although it had not bin deviſed or bequeathed to him, and that before any will proved. Secondly, he could not by right

See Co. lib. Intr. 150. the executor being deviſee for life ſaid, the other ſhould have it after her death and he entred and tooke admin. ſhe dying inteſtate, yet held Aſſets in him.

This M. 19 H. 7. Rot. 318. See lib. Intr. 321. One gave the third part of his goods to A with whō the exec. accounted for the amount, and A ſued for that ſumme in det, but no judgement upon demurrer.

Tr. 37 Eliz. in ba. reg. Wherebequeſts to exec. himſelfe.

right have it as legatee without assent of himself or some other as executor. Therefore this general accepation can determine no election, as elsewhere is held. As for disassent or disablement to assent. As if the executor do once declare his assent that the legatee shall have his legacy, he may then enter into it or take it notwithstanding the executors countermand or revocation of his assent after. So on the other side, I think if he do fully and expresly deny that the legacy shall take effect, he cannot after make a good assent thereunto, for that election once made must stand peremptory, be it refusall to assent, or assent. Yet *que.* of this, for that the refusall to assent may be checked by sentence or decree, in the Spiritual Court or Court of Equity, and so an assent be inforced. But if the power of assenting be legally lost by the meanes aforesaid, *viz.* disabled, I see not how any legall interest can be transferred by that compelled assent, howsoever decreed. And what is said of a legacy bequeathed to another, the same may be understood in case where the bequest is to the executor himselfe, and he makes his election to have it as legatee, or as executor. But if where an Horse is bequeathed to *A*, the executor after the testators death doth ride the horse or use him in the Coach, or in the Plough; I do not take this to be any such disagreement to the execution of the legacy, as that the executor cannot after assent to the legatees having thereof, no more

Tr. 37 Eliz. If he by will bequeath it to I. S. this is an election to have it as legatee.

So if the exec. take a new leas his assent after is void. Tr. 37. Eliz. in Carters case.

19 Eliz. D. 359

(though

(though it be somewhat more) then where a drinking-cup is bequeathed, and the executor after the testators death doth use it to drinke in, nay, if a lease of land be bequeathed to *A*, and the executor continueth the depasturing of the testators therein, yet is not this any disagreement to the execution of the legacie, but if this lease-land were let out by the testator from yeare to yeare, and the executor dischargeth the tenant, and taketh it into his hands at the yeares end, this I conceive to be a dis-assent to the legacie, and so also perhaps may his taking or distraining for any rent thereupon due after the testators death; yet am I not resolute that the dis-assent is so peremptory and unchangeable, as the assent, remembring the case in King *Henry* the eight his time, where a terme being granted by a lessee conditionally, so as the assent of the lessor could be had by such a day, though the lessors assent were at one time denied, yet might it be yeelded at another, so as it were at any time before the day: But yet there it was held, that if no time of assent were limitted, then one expresse deniall or refusall would be peremptory, so as the refusall were expressed to the party to whom the assent was to be given otherwise, if it were but in speech to or among strangers. This and the former case, 19. *Eliz.* give the best light to this point that I remember. Now for disablement to assent, it was held in the fore-mentioned case of *Low* and *Carter*, that where a terme is bequeathed

14. H. 8. 23.

Dy. 359. After choice once made, no variation.

thed to *A*, and after the teſtators death the executor takes a new leaſe of the ſame land for more yeares in poſſeſſion, or to begin preſently; now by this was the terme left by the teſtator ſurrendred and drowned, ſo as it could not paſſe to *A* by the executors aſſent after.

As to the fifth point, *viz.* in what manner a leaſe for yeares or other chattell reall may be bequeathed to one for a time, with remainder to another; it hath been heretofore much doubted, when a leaſe for yeares was bequeathed to one for life, or for ſo many yeares as he ſhould live, whether the limitting of a remainder thereof after his deceaſe were of any validity in law or not: and this doubt had this ground; any ſtate for life in the judgement of law is greater than any terme for yeares, therefore when a termer hath by his will given his terme, or his houſe or land, which hee ſo holdeth for yeares to one for life, or for ſo many yeares as he ſhall live; this teſtator and deviſor hath not in the judgment of the law any eſtate remaining in him; and therefore it was thought very hard for him to give or limit a remainder to another: But after many arguings and debatings, it was in the late Queenes time reſolved that ſuch a remainder was good, and that if the firſt deviſee died before the terme expired, that then he to whom the remainder was limitted, might enter and enjoy the reſidue of the terme: As for the giving of part of the years to one, and the reſidue to the other: *viz.* If the Plow. Com. 520. & 542.

terme being twenty yeares, the Leſſee bequeatheth ten thereof to his wife, and the remainder to his daughter. Of this no doubt ever was, but that it was good, for that after the firſt ſtate limitted, there remained a further terme, *viz.* ten yeares more in the Deviſor, whereof he had power to diſpoſe, whereas in the other caſe, after the terme limitted to one for life, there remained but a poſſibility that this life ſhould not take up the whole terme. But now put we the caſe a third way, *viz.* that the termor deviſeth or bequeatheth the thing in leaſe to one child intaile, with remainder to another, and dieth, and the firſt entreth and dyeth without iſſue; now whether ſhall the next in remainder, or the executor of him ſo dying have the terme reſidue, and this caſe came in queſtion, and was adjudged about the middle of K. *Iohn* his reigne in the Exchequer, for there Maſter Hamond holding by leaſe for yeares from the Crowne, the manner of Akers in Kent deviſed the ſame by his will to *Alexander Hamond* his eldeſt ſon and the heires males of his body, with remainder to *Ralfe Hamond*, another ſon in like manner, and the like remainder to *Thomas Hamond*, and made the ſaid *Alexander* executor, who after his fathers deceaſe elected to take as legatory, and after *Ralfe Hamond* died leaving iſſue male, and making his wife executrix; *Alexander* not having iſſue male, granted the whole terme by deed to *B* and *C*. for the behoofe of himſelfe and his wife during their lives,

Both Alexander and Ralfe were executors; but that makes no difference.

lives, and after to the uſe of his yongeſt daughter whom Sir *Robert Lewkenor* married ; then *Alexander* dying without iſſue male, the wife, and Executrix of *Ralfe Hammond* entred claiming the terme , and being kept out ſealed a Leaſe, whereupon an *Eject. firme* was brought, and a Jury appearing at the Barre in the *Exchequer* found a ſpeciall verdict in effect *vt ſupra*. And in argument of this Caſe, firſt the maine queſtion was whether this caſe were all one in Law with the former, where a terme was deviſed to one for life, which remainder over ſo as by the death of *Alexander Hammond* without iſſue male, the terme ſhould goe to the next in remainder as in the other Caſe, by the death of the deviſee for life dying within the terme it ſhould doe. And on the plaintifes part it was urged to bee all one, ſo that by vertue of the *Bequeaſt ſupra*, *Alexander* had an eſtate to him, and his Executors onely, ſo long as there ſhould bee heires males of his body, and hee dying without ſuch iſſue, the terme remained to the Executors of *Ralfe*, who had the remainder in like manner, and left iſſue male which ſtill lived, and ſo that ſeate of *Ralfe* yet had continuance. For it was admitted by the counſell on that ſide, that the terme could not goe to the iſſue male of *Ralfe*, according to the words, and intent of the will, ſince it was impoſſible to make a terme to deſcend without an act of Parlament. This therefore they ſaid the Law ſhould worke, which was neereſt to the

intent, viz. that after *Alexanders* death it ſhould goe firſt to his Executors, and aſſignees, ſo long as iſſue male of his body doth continue, and for want of ſuch iſſue, then to *Ralfe* his Executors and aſſignees, ſo long as his iſſue male ſhould laſt, and therefore in this caſe the iſſue male of *Alex.* failing, the executor of *Ralfe*, whoſe iſſue male fayleth not, ſhould injoy the terme, and ſo judgement ought to be given for the plaintife, being leſſee of that Executor: on the other ſide it was ſaid by the defendants counſell, that this Caſe differeth much from the other Caſe, where the terme or Land held by Leaſe, is given but for life to the firſt with remainder to another; which Caſe as having beene often reſolved, was clearely admitted to bee good law; for in that caſe the intent of the Teſtator might, and did take effect. But in this caſe if the land ſhould goe to the Executors, and aſſignees of *Ralfe Hammon*, it muſt goe againſt the intent of the Teſtator, whoſe mind, and will was, as it appeares by his word, that it ſhould goe onely to the iſſue male, of one ſonne after another, and not to any Executors. Now then ſince this intent was ſo contrary to the rules of Law that it could not take effect, therefore it muſt be voyd, and ſo all the words of heires Male ſtanding voyd, the Will is to be conſtrued as a ſole, and abſolute gift, and bequeaſt to the ſaid *Alex.* & conſequently the terme muſt goe to his Executors, and aſſignees. And for this point reſemblanee was made to a Caſe reſolved in the

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Kings Bench; where a Leaſe was made by indent. to *A. Habend.* to *A. B.* and *C.* for their lives: now becauſe *B.* and *C.* could take nothing it was reſolved that *A.* ſhould not have it for their lives, but for his owne onely. This Caſe was ſaid to come very cloſe in reaſon to the Caſe in queſtion; for as heere the intent of the Leaſe was that *B.* and *C.* ſhould bee eſtated for their lives, and ſince that could not bee, therefore the naming of them ſhould bee utterly voyd, and as if they had not at all beene named; and their lives ſhall not ſtand as a meaſure for the eſtate of *A.* So in thother Caſe the intent of the will, being that the Leaſe or Land leaſed ſhould goe to the heires Males of the body; firſt, of *Alexander*, and after of *Raulphe*; ſince this cannot bee, therefore the words, and name of heires males ſhould ſtand for a meere blancke and cipher, and not to meaſure out any ſtate to the ſaid *Alex.* and *Rs.* and their Executors, and aſſignes. Alſo it was ſaid on the defendants part that an eſtate for life in the judgement of Law is of ſo ſhort, and uncertaine continuance, that if *A.* make a Leaſe to *B.* for his life, and after makes a Leaſe of the ſame Land to *C.* for yeeres now, ſhall not this latter Leaſe bee voyd abſolutely, for any part of the terme, but ſhall ſtand in expectance of the death of *B.* and as ſoone as hee dyeth, ſhall take effect immediately, whereas if the Leaſe to *B.* had been for ten yeeres or any like terme, then the Leaſe to *C.* ſhould have beene voyd for

Windſmore & Holford, vel Holbord in. 28 & 29. Elizab. argued; and Tr. 29. Eliz. adjudged.

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ſo many yeeres of his terme, thus it appeares that a State for life is very momentary in the judgement of Law, and not reputed of any certaine continuance ſo much as for a day, but it is otherwiſe of an eſtate tayle, ſo as if *A.* having given Land to *B.* in tayle doth after (without indenture which makes an Eſtoppell) make a Leaſe to *C.* for *xxj.* yeeres, and then *B.* dyeth without iſſue during the terme, yet ſhall not the Leaſe take effect, becauſe it was utterly voyd at the firſt making. For an eſtate tayle being a ſtate of inheritance may in the intendment, and judgement of Law have continuance for ever, as appeares both by the Caſe of *Adams* and *Lambert*, where it is held within the Statute of Chaunteries which ſpeaks of gifts to have continuance for ever. Therefore a reverſion upon an eſtate tayle is no aſſets, nor giveth cauſe of receipt, otherwiſe in all theſe Caſes it is touching a reverſion expectant upon a ſtate for life. Againe it was ſaid by the defendants councell that an eſtate may bee limitted to *A.* and his heires during the life of *B.* with remainder to *C.* as in *Chudlies* Caſe was reſolved, but if Land bee given to *A.* and his heires, ſo long as *B.* ſhall have heires of his body or heires males with remainder over to *C.* this remainder is utterly voyd. So as there is in the judgement of Law a great difference betweene the largenes, and continuance of an eſtate tayle, and of an eſtate for life. And if (which is worth the obſerving)

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a fee ſimple cannot afford a remainder to bee drawne out of it after ſuch a gift to one, and his heires during the continuance of an eſtate tayle, or of the meaſure thereof; much leſſe can a terme yield ſuch large thongs to bee cut out of it, as a remainder after an eſtate to one ſo long as hee ſhall have heires of his body, or heires Males, which is all one. And in this caſe the remainder was held voyd by *Baldwin*, and *Shelley*, though *Engleſield* were of contrary opinion, as the Lord *Dyer* ſheweth. Further it was ſaid, that if ſuch a conveyance by will ſhould ſtand good, it would raiſe a perpetuity not to bee cut off, by any recovery. 28 H.8. Dy. fo. 7.

But whereas the caſe of *Hamon* hath beene related before, (ſo by way of admittance it was argued as a gift, and bequeſt to *Al. Ham.* and the heires Males of his body with remainder in like manner to *Ralfe*. The truth of the caſe was, that the words of the will, were onely to *Alexander*, and his heires Males (not ſpeaking of his body) and ſo to *Ralfe*, which as was urged by the defendants counſell, made the Caſe ſtronger againſt the plaintifes: for admit that the former way *Alexander* ſhould have had but a ſtate determinable upon the continuance of his iſſue Males, yet here not ſo. Since the reaſon why in Wälles, ſuch a deviſe being made, the Law ſhould ſupply the words (of the body) is onely to make an eſtate tayle to the iſſues Male according to the Teſtators intent. Now

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in this caſe of a terme for yeares ſo bequeathed no eſtate tayle could poſſibly bee, though theſe words had beene in the will, and therefore the motive to the Law fayling, no ſuch ſupply will bee made by the Law, ſince it would bee to no purpoſe: conſequently, here was neither ſtate tayle nor iſſues or heires Males of the body, on whoſe continuance this ſtate of *Alex.* ſhould bee determinable. Therefore it was an abſolute, and totall bequeſt of the terme to *Alexander* for ever, *viz.* ſo long as the Terme ſhould continue: for as a bequeſt to one for ever is aſmuch as a bequeſt to him, and his heires; ſo a bequeſt to one and his heires, is as much as if it had beene to him for ever.

And this Caſe after ſixe arguments, on each ſide at the Barre (if I much miſtake not) was upon argument by the Barons adjudged for the defendant, by the Lord chiefe Baron *Tanfeild*, and Mr. *Baron Bromley*, Mr. *Baron Denham*, (who onely heard as I take it, one argument on each ſide, made of purpoſe in reſpect of his comming into his place after the former arguments) being of the contrary opinion: and the judgement proceeded upon the point formerly touched, that as this caſe was the ſtate of *Alexander* did not end by his death, and remaine to the Executors of *Ralfe*. Other points were ſtirred which will bee touched upon other diviſions after in this Chapter. It will be obſerved that I doe more fully expreſſe reaſons, and points inforced on the defendants part, then

then on the plaintifes, whereof let theſe two reaſons bee accepted. Firſt, That I better could relate that then the other, being the firſt who argued for the defendant, and hearing little of that which was by others ſaid on either ſide after, nor hearing the Courts, *Nec ad hoc conductus, nec pedibus fortis*. Secondly, the labour did lie on the defendants part to prove that this Caſe differed from the common caſe of deviſe to one for life, with remainder to another.

Wee are now come to the ſixt point. *viz.* that where Houſe, or Land held by leaſe, or the proffits thereof, or the leaſe or terme it ſelfe which in a Will makes no difference, is bequeathed to *A.* for life, or for ſome part of the terme with the remainder to *B.* and the Executor aſſenteth that *A.* ſhall enjoy his bequeſt, whether this ſhall enure to *B.* alſo ſince without the Executors aſſent, no legacy can take effect. And it hath beene reſolved that this aſſent ſhall bee effectuall, as well to all the remainders as to the firſt eſtate, and ſo according to former reſolutions, it was admitted in *Hawons* Caſe, that *Alexander* his aſſent to take as legatee ſufficed (if the bequeſt had beene good) for the remainders to *Ralfe*, and others. And the reaſon of this doubtles is, becauſe heere the particular eſtate, and the remainder are all but one eſtate in Law; they make but one degree in a Writ of Entre, nor ſhall have but one yeere, and a day to enter

Ploud. 545. 6. Co. lib. 10. f. 47

for mortmaine; And an attornement to the grantee of a rent or reversion for life with remainder over doth enure also to the remainder, which being an assent hath much affinity to that of the Executor, each tending to perfect the grant of another man. Now then whereas it was urged in *Hammonds* Case, that the state limitted to *Ralfe*, should take effect not as a remainder but as a new estate to commence futurely. *viz.* when *Alexander* should bee dead without issue male: if it should bee admitted to bee so, then could not the assent of the first state to *Alexander* have enured to this, since to *A.* remainder it worketh as being one estate with the first, which reason must faile thother way. This difference betweene a remainder, and new estate future brings to my minde the case of a rent by way of new Creation granted by *C.* out of land to *A.* for life or in taile with remainder to *B.* in like manner where it hath probably beene held, although this limitation to *B.* cannot bee good by way of remainder, because *C.* had no estate in the rent remaining with him when hee made the grant to *A.* yet should it be good by way of new grant, and creation to commence futurely. But this doubtles cannot so be but with a difference, for if the grant were by indenture betweene *C.* on thone part, and *A.* only on the other part, now *B.* being no party to the deed can take nothing by it except by way of remainder; but if hee were party to the indenture, or if the grant

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were by deed poll to which all men are alike parties, then it happily may enure as a future grant to *B*. This not impertinent.

Now as the executors assent to one cannot enure to another though of the same thing, except by way of remainder, so neither can it any way where the things are not the same, except in very speciall cases; as if a termor bequeath a rent to *A*, and the land it selfe to *B*, the executors assent that *A* should have the rent is no assent that *B* should have the land; yet I think the assent that *B* should have the land, doth imply the assent that *A* should have the rent. 1. For that the restraint imposed by the law, against the passing of a chattell by a will without the executors assent, being out of respect to the payment of the testators debts: now if the land shall passe to *B*, it is no more availeable to the testators debts that it passe discharged of the rent then charged. 2. Since the gift and bequest was of the land charged with the rent, therefore if this bequest shall take effect it shall carry the land according to the testators intent, *viz.* with this charge upon it: for what else doth the executor in this but assent that the will of the testator herein do stand and take effect, and consequently *B* must take the terme according to the will, and not in any different or contrary manner.

Plowd. Com. 521. In Bret & Rigdens case. So of common or other profit.

Next we are to consider of the manner of assents by executors, which hath some affinity with the fourth point. But here we shall con-

ſider only of aſſents conditionall, now to this purpoſe we will caſt our eyes upon two ſorts of conditions, *viz.* precedent and ſubſequent. As for the former, an executor may to a legatee abſolutely given aſſent upon a condition precedent, as thus. I am content, that if you can get and bring in to me ſuch a bond wherein the teſtator ſtood bound unto *I. S.* that then you enter upon the terme, or take the corne or cattell to you bequeathed. So of other like conditions which may precede the aſſent, as if you can get the aſſent of my coexecutor, or if you will pay the arrerages of rent to the leſſor behind at the teſtators death, or if you will pay the wages already due to the ſervants attending about the cattell or corne to you bequeathed. In this caſe, if the condition be not performed, there is no aſſent, and therefore the conditioning in this manner is good. But if it be upon a condition ſubſequent, as thus I do agree, that you ſhall have the thing bequeathed to you, provided that you ſhall pay ſo much yearly to me, or to ſuch a creditor of the teſtator, now the legatee entring into or taking the thing bequeathed, ſhall not loſe it againe by failing to performe the condition afterwards, for the executor by his aſſent cannot make that legacy conditionall which the teſtator gave abſolutely, no more then he can make that bequeſt to be abſolute which the teſtator gave conditionally, except by a releaſe made of the condition. As in other things, ſo in this

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the executors aſſent is like to the atturnement of a leſſee, which cannot be upon a condition ſubſequent, where the grant is abſolute or without condition, though yet he may to his atturnement prefix a condition precedent.

In the eighth place we are touching the bequeſt of leaſes or chattels reall, to conſider what manner of intereſt one to whom a remainder of a terme after the death of another is limited, hath, and whether he may grant the ſame or diſpoſe thereof during the life of the firſt. And as to that it is cleare that he hath but a poſſibility of remainder, for that poſſibly the whole terme may be ſpent in the life of the firſt, to whom during his or her life it is bequeathed, now a meere poſſibility is not grantable. Therefore was it reſolved in the late *Queenes* time, where hee in remainder granted or ſould his ſtate or intereſt to another during the time of the firſt, that this grant was utterly void, becauſe a poſſibility cannot be granted; but whereas ſome opinion in that caſe was delivered that this poſſibility could not be releaſed, no more then granted, it hath ſince bin reſolved that he in the remainder by his deed of grant or releaſe to the deviſee for life may make his eſtate, which before was determinable by his death to be now abſolute, ſo as it ſhall continue to his executors, adminiſtrators, and aſſignes after his death during the whole terme. It may be that what was conceived in the ſaid caſe of *Fulſey*, negatively of the

99 Eliz. Fulſes caſe.

Lampets caſe. Co. l. 10. fo. 48.

validity of a releaſe by him in the remainder, might be meant or perhaps expreſſed of a releaſe to him in the reverſion; but ſurely me thinks though he could not ſurrender, yet his releaſe or defeaſance to him in reverſion or remainder having the freehold or inheritance, ſhould diſſolve or deſtroy this terme reſidue after the death of the diviſee for life, ſo as there the freehold ſhould be diſcharged thereof. But *Qua.* for I have not knowne this in queſtion. As for the other point of *Fulſes* caſe, it was in the ſaid later caſe of *Lampets* confirmed and admitted for good law, *viz.* that this poſſibility of remainder could not be aliened nor conveyed to a ſtranger.

9 *Point.* Now we are come to the ninth point, *viz.* to examine whether any act of the deviſee for life can fruſtrate or defeate him in the remainder of the terme, and whether by the act of God, *viz.* the death of him in the remainder before the firſt deviſee for life ſhall defeat it. As to the firſt, it hath divers times been reſolved, that no grant made by the firſt man cut off or defeat the ſecond, though formerly it were held otherwiſe; but according to the later reſolution was it alſo held or admitted by all in the ſaid caſe of *Hamond*, where was ſuch a grant. And as this cannot be done by direct grant or alienation, no more can it by an indirect, or implyed, as by taking of a new leaſe, which is a ſurrender in law of the old leaſe, no more then by an expreſſe ſurrender. Nor doubtleſſe

Plowd. 520. Welcden and Elkington, 10. El. D. 277, 19 Eliz, D. 359. Cont. 8 El. D. 253. & 33 H. 8. Bro. chatelx. 23.

doubtleſſe by outlawry, whereby the terme of the firſt diviſee is ſetled in the Crowne. But if we put the caſe further of waſte committed by the tenant for life, or breach of condition by not paiment of the rent or otherwiſe, theſe for the whole in the later caſe, and for the part waſted in the former, doe ſo deſtroy the leaſe, and put the reverſioner in *Statu quo prius*, as that all remainders muſt needs faile; ſo of a feoffement or other like forfeiture by fine. As for the death of him in remainder, it was urged in the caſe of *Hamond*, that ſince it was but a meere poſſibility, if it could not take effect, and become an eſtate in the life of him to whom it was limitted, it could not ſettle in his executor; and to that purpoſe were cited the caſe of the Rector of Chedington, and more expreſly as reſolved in the point, the caſe of *Price* and *Atmore*. But the Court reſolved (and found former reſolutions in other Courts that way) that the death of him in remainder did not hinder, but that it may ſettle as well in his executors upon the death of the deviſee, as it ſhould have done in himſelfe, if he had overlived the firſt diviſee for life. If the leſſor enter and levie a fine, and the diviſee for life enters not, nor claimes in five years, he in the remainder may enter, as having a right futurely accrued.

Welcden & Elk. ubi ſupra. But there the point was never queſtioned, though ſuch death was there.

In the laſt place wee intermedled only with Leaſes bequeathed, wherein yet is to be underſtood, that what thereof is ſpoken, is to be extended 10. *Point.*

tended to, and understood of all other chattels reall, as wardship of body and lands, estates by extent upon statutes or judgements, termes otherwise than by lease, in faires, markets, rents, annuities, commons, advowsons, and other profits; yea, one single next avoidance of a Church. Now we come to consider of bequests personall, principally, if not only, *viz.* how such may be forfeited, lost, or revoked. First then, we will consider of the acts of the legatee; secondly, of the acts of God; thirdly of the acts of the testator. The legatee, as from the Civilians I learne, may forfeit his legacie by his mis-cariage towards the will: as if hee use meanes to have it concealed and kept from being knowne, and consequently proved. So if he accuse it of falsity. So againe, if he deface or destroy the will. Also if being by the will appointed to be tutor or educator of a child, he refuseth so to be; so saith Master *Swinborne*: but *Silvester Prierius* seemes to me opposite in that where he saith, *Si legatum fuerit aliquid ea conditione ut facias aliquid, tale legatum non est conditionale, sed modale*; so as he takes away the force of a condition from words conditionall, whereas the other without words conditionall raiseth a condition implied. Lastly, if the legatee presume too farre upon the strength of of the bequest to him, so as he taketh the thing bequeathed without the consent of the executor; thus also doth he forfait his legacie, saith Master *Swinborne*, unlesse the testator did will and

Of forfeiture, revocation and other losse of legacie.

Swinb. de testam. 352, 353. Except as tutor or guardian he accuse it.

Sum. Silv. 284.

De testam. 252.

and appoint he ſhould ſo doe. The falling into enmity with the teſtator, will be conſidered of more fitly, as I take it, among the acts of the teſtator. In the next place let us ſee what acts of ſhall God cauſe a legacy not to take effect, firſt thus: If the legatee die before the teſtator, this legacie is loſt, and his executor ſhall not have it: So alſo ſaith Maſter *Swinborne*, if it be appointed to bee paid after the death of the executor, and the legatee dieth before the executor, it is loſt; and ſo alſo if he dye before the condition performed, ſaith he; Let us come now to time of payment, and death before it. If there bee a day certaine limitted for payment, and the legatee die before that day, his executor ſhall have the legacie; contrariwiſe, if the paiment were limitted to be made when the legatee ſhould be married: but if it were only expreſſed to be towards the marriage of the legatee, and ſhee die before marriage, her executors ſhall have it, ſaith *Swinborne*. Now put the caſe that a legacie is bequeathed to *B* to be payed when he ſhall be five and twenty yeares old, and *B* dyeth before that age, it ſhall now be paid to the executor, and that preſently without ſtaying till *B* ſhould have been of that age, ſaith *Prier*. Nay, ſaith *Swinborne*, if the words of the will be ſo, *viz.* when he ſhall come to ſuch an age, then if he die before, his executors ſhall not have it at all, but if the bequeſt be generall; and further it is added in the will that the teſtator would have that legacie

De teſtam. 255 Vide Bro. Deviſe 27. & 45. there were divers dayes of payment, and the deviſee dyed before the laſt; his executor ſhall have it. 14. vel 24. H. 8. 36. H. 8. & 3 El. Dy. 59. See this difference.

Sum. Silv. 283.

According hereto; vide Dy. ubi ſupra, per majorem opinionem Juſticiar.

paid the legatee at ſuch an age there though he die before ſuch age, yet his executors ſhall have the ſumme bequeathed. The difference may ſeeme very nice, yet happily it wants not ſome probable colour of reaſon. Now laſtly, let us come to the teſtators own act, who clearly hath power to revoke or countermand any legacie, though he revoke not the reſt of the will; and here firſt of revocation preſumed. If there fall out *Graves inimicitiæ inter legantem & legatarium, legatum caducum efficitur*, ſaith the Summiſt; *Sed non propter leves*, ſaith he, *& ſi graves ſi tamen redeant ad amicitiam, reintegratur legatum*, that is, by grievous enmity after ariſing, and never reconciled between the teſtator and legatee, the legacie is diſſolved, otherwiſe of a light breach, or falling out, though it continue untill the death of the teſtator. This I conceived to be rather fit for this place, as an act of the teſtator, then to be reckoned or regiſtred among the acts or forfeitures of the legatee, for that it is not by the Summiſt made materiall, or any point of difference, whether the legatee gave juſt cauſe of offence, or that the teſtator unjuſtly conceived diſpleaſure, and ſo grew into cauſeleſſe enmity. Therefore alſo doe I hold it of the nature of a revocation implied or preſumed, for that although no revocation be made, yet ſince the teſtater hath ceaſed to beare good will to the legatee, hee cannot be intended to will him good, nor conſequently to be of the ſame minde, touching the

Acts of the teſtator.

Sum. Silic. 285.

ſtie benefiting of him, as he was when he made his will: yet here againe it is worth the conſideration whether the circumſtance following may not make a difference in the caſe thus; that where the teſtator dieth ſhortly after the breach and enmity growen, and before hee come to the place where his will is, or at leaſt to opportunity of peruſing and reforming the ſame: There this very alteration of affection ſhould make an alteration in the will, and a revocation of the amicable bequeſt. But where he living a good ſpace after, and comming to the place where his will was, and ſpecially if he doe againe peruſe it, and yet doth not croſſe nor expunge that bequeſt, here it may be preſumed that either his enmity ceaſed, or that ſo farre as to continue this bequeſt, the charity or other motives inducing him to make it, ſtood unvanquiſhed and not extinguiſhed by this breach of former amity. For as the continuance of time and opportunity after the making of a verball or nuncupative will, without reducing it to writing, and cauſing it to be atteſted by witneſſes, though the teſtator live divers years after, doth ſtrongly argue his intent not to continue, that what was done in an extremity ſhould ſtand as his will: ſo on the contrary, the permitting of a bequeſt expreſſed in a written will, to continue without any croſſing, blotting, or defacing, may argue againſt contrary preſumption, the teſtators mind, that it ſhould continue as part of his will. But now let us con-

ſider of more expreſſe revocation, and to that purpoſe will I relate a late decree in the Chancery, made by the Lord Keeper, according to the opinion of the Maſter of the Rolls, three Judges, and two Doctors, Maſters of the Court; Betweene *Robert Eyre* and *William Eyre* complainants, and *Heſter* late wife of *Chriſtopher Eyre* their brother, and now wife of Sir *Francis Wortley* Defendant; Thus was the caſe. The ſaid *Chriſtopher Eyre*, 15. *Jacobi*, by his laſt will and teſtament giveth and bequeatheth to the ſaid *Robert Eyre*, his brother, an hundred pounds, and to the ſaid *William* his brother a thouſand pounds, and gives to the ſaid *Heſter* his wife all the reſidue of his eſtate, and makes and ordaines the ſaid *Heſter* his ſole and only executrix, ſaving for the performance of his will ordaines *Robert Eyre* and *William Eyre*, his ſaid brothers, whom hee intreats to joyne as executors in truſt with his wife, for the better performance of this his laſt will. Afterwards, 5. Jan. 1624. being ſick of the ſickneſſe whereof he died, he was moved by Maſter *Damport*, and Maſter *Stone*, to ſettle his eſtate; to which motion he yeelded, and Maſter *Stone*, and Maſter *Damport* did demand of the ſaid *Chriſtopher*, what friend hee thought fitteſt to be his executor, and to whom he would commit the care of diſcharging his funeralls, and performing his will, whether hee truſted any perſon more than his wife, to be his executor? To whom he anſwered, That his wife was the fit-

teſt

teſt perſon for that purpoſe, and therefore ſhould bee his ſole Executrix, and then the Teſtator was moved by *M. Stone* to give, and bequeath legacies to his father, to his brethren, and to his kindred, whereunto hee anſwered hee would give or leave them nothing, and being further put in mind to remember his friends and others, gave and bequeathed to *Lionell Atwood* his Godchild, 20 or 30ˢ. and being thereupon moved by his wife to give his ſaid God-ſonne more, or a greater legacy, or the like in effect; ſaid, thou knoweſt not what thou doſt, doe not wrong thy ſelfe, 20ˢ. or 30. Shillings is money in a poore bodies purſe, or the like in effect, and the reſt, he left them to his wives diſcretion or diſpoſition, and the ſaid teſtator did ſpeake the words aforſaid, or the like in effect. *Animo teſtandi & ultimã voluntat. declarandi*, as the witneſſes then preſent did cõceive.

This will was proved by the oath of the ſaid *Heſter*, and this *Codicell* being pleaded as a revocation of the ſaid bequeſts, The ſaid maſter of the Rolles, Judges, and Doctors were by the Lord Keeper, and the order of the Court deſired to reduce the matter upon the will, and *Codicell* into a caſe, & to certify their opinions, whether the ſaid *Codicel* were a revocation of the legacies given to the plaintifes or not. And they after coũſell heard at ſeverall times, *viz.* both cõmon lawyers, & civillians, & many houres ſpent in conference together did finally reſolve with one unanimous conſent, That the legacies to

Ord. 27. Jun. 2. a. Caroli regis.

the plaintifes given were not by the ſaid *codicill* revoked, and ſo certified under their hands, upon reading whereof 25. *Novembr.* decree being reſolved to bee made if cauſe were not ſhewed to the contrary, 27. *Novembr.* on which day the defendants counſell before Lord Keeper in the preſence of the maſter of the Rolles, and the ſaid three Judges, and Sir *Iohn Heyward*, alledging what they could in ſtay of the ſaid degree, It was by a generall concurrance of opinion decreed, that the legacies given to the ſaid plaintifes, ſhould bee to them payd on our Lady even with 20. Nobles in the hundred for the detaynment thereof.

This caſe I thought fit to relate ſomewhat at large, becauſe it pitcheth upon the point of revocation without plaine, full, and expreſſe termes. And ſurely as willes are to bee made out of diſpoſing memories, and underſtandings, ſo alſo with deliberate, and adviſed judgments, and therefore by like reaſon not to bee countermanded or revoked by ſicke, or ſlight expreſſions. And this ſeemes to me very agreeable with the rule, and reaſon of the common Law. For as reaſon it ſelfe doth dictate that *Nihil tam conſentaneum eſt equitati naturali, quam unumquodque diſſolvi eodem modo quo conſtitur*; So hath the common Law of *England*, in my underſtanding reſolved; as for the purpoſe, if the King preſent a clarke to a Church, and hee is thereupon admitted, and inſtituted thereunto: Now yet before induction may this be revoked

revoked as a will may. Yet if the King shall after, and before induction present another man to this Church without an expresse repeale or countermand of the former presentation, it shall not hereby bee revoked. So if lands were conveyed to certaine uses, with a clause or power of revocation; the sale of the same to another did not revoke the former. But if a state were merely at will, then the conveyance to another by the common Law, amounted to a revocation. Therefore was the Statute made *tempore Henrici* 8. to redresse this, *viz.* that where the King had granted lands, or other things to one during his pleasure, this should not bee revoked by a grant to another without recitall of the former, and declaration that the King had determined his pleasure.

To helpe this was the Stat. made 27. Eliz. cap. 8.

6. H. 8. cap. 9.

Being now to consider of relation in the Executors assent, it is meete that since these discourses are principally intended, for those who are not grounded Students in, or professors of the Law, that wee shew what wee meane by relation, or what it is in Law. Thus therefore bee it conceaved; that relation is a kinde of fiction in Law, making a thing done at one time to bee accepted, and repuld, or to have its operation as if it had beene done at another time past. As for the purpose. A doth bargaine, and sell freehold lands to *B.* in *August* by indenture which is not inrolled untill *October* following, yet this hath such relation to the date of

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the indenture, that if *A.* after that, and before the inrolment become bound in a Statute, or granted a rent charg, or made a leaſe for yeeres, or tooke a wife, or committed felony, yet ſhall none of theſe bee of any force to charge or prejudice the ſtate of *B.* for that the Law adjudgeth him now owner by relation as from the time of the date: yea if a ſervant departing in *Auguſt* for ſome great breach with his Maſter do kill his maſter in *October*, this is in law petty treaſon, as if hee had continued ſervant when hee did the fact, becauſe it relates to the malice conceaved when hee was his ſervant. Now then having ſhewed that a terme or other chatell reall or perſonall, paſſeth not nor is transferred in property to the deviſee untill the aſſent of the Executor bee thereunto had; Wee now put the caſe that this aſſent is not had till a yeere, or ſome ſuch good ſpace after the Teſtators death, and make our queſtion whether this ſhall have relation to the Teſtators death, *viz.* to bee in the lawes account as if it had then beene. Or perhaps to ſome purpoſes ſo to ſtand, and to others not ſo. That this is uſefull, and materiall to bee knowne bee it thus ſhewed. One bequeatheth his terme of tithes of an advowſon of an Houſe or land by him firſt leaſed to an undertenant for rent, and dieth in *May*, the Executor aſſenteth to the bequeſt in *October*, betweene which two times tithes be ſet out, the Church becommeth voyd, rent groweth payable; now if this aſſent ſhall

relate

relate to the Teſtators death, the deviſee ſhall have theſe elſe not; the like caſes may be put of the brood of Cowes, Mares, and Ewes, fallen betweene the death of the Teſtator, and the aſſent; ſo alſo of Fleeces of Sheepe ſhorne, &c. Now to come to the point, it is reported by the Lord *Cooke*, to have beene held in the late Queenes time, that this aſſent ſhall as betweene the Executor, and the legatee, have relation to the Teſtators death, yet ſo that if the Executor before his aſſent to the deviſee of a leaſe committed waſt; now the action of waſt ſhall bee brought againſt the Executor, in the *Tenuit* for the waſt done before, and not againſt the deviſee in the *Tenet*. But put the caſe that the legatee before the Executors aſſent granted the terme to *I. S.* now if to any purpoſe this aſsent ſhall have relation, it ſhall certainly ſo bee to make good this grant, as making the legatee to bee eſtated, and conſequently able to grant before the Executors aſsent, yet doe I not finde any opinion or reſolution in the Point, but finde it debated at the Barre in the late Queenes time betweene *Puckering*, and *Egerton*, in the caſe of adminiſtration granted to *A.* after her grant a free terme, left by her inteſtate husband; but I finde no reſolution therein, nor perhaps wants there materiall difference betwixt that caſe, and the other: for there the deviſee had at leaſt an inception of title by gift of the owner, wanting onely a circumſtance of aſsent to perfect it: but heere

Tr. 41. Eliz. Co. lib. 5. fo. 11 a B. Sanders Caſe.

Vide Plow. com. of an action of treſp. againſt a ſtranger for taking before aſſent. 280. b.

P. 25. Eliz.

this woman till administration had not so; unlesse perhaps the Statute 21. of *Henry* the eighth, directing or enjoyning ordinaries to grant administration shall amount to a kinde of title, *ad rem* though not yet *in re*. But to returne to the Point of assets; where a reversion is granted by deed or fine, if the lessee a good time after doe atturne, this shall have no relation to the time of the grant; So as for wast committed or rent growne due between the grant, and atturnement, the grantee can have no remedy. Therefore it is good for him who buyeth or hath any thing of the gift of a legatee, to have the assent of the Executor, before the sale or gift well testified, or if the assent bee not had till after, let him take a new gift, that hee may not rest in a doubtfull case, for besides the premisses that great legist, Sir *Edward Cooke* when hee was a practiser to Master *Stubbes* of *Norfolk*, for his Sea gave his opinion as I have beene confidently informed, that where a lessee, for yeeres, being outlawed did grant his terme, and after reversed the outlawry, this did not make good the grant by relation, it not being in the grantor at the time of his grant, and this hath much affinity with the principall point, for there if the relation helpe not, the grant is not good from the Legatee.

48. E. 3. 15.

Divers

Divers caſes of bequeſts conſidered, and expounded.

IF a termor of an Houſe, bequeath his Houſe to *B.* without expreſſing how long he ſhould have it, he ſhal have the whole terme, and number of yeares. So of land. 14. Eliz. Dy. 307. conte. in a grant. 31. Eliz.

Alſo by the name of the Houſe, the Orchards, Gardens, and Backeſides doe paſſe: yea if the Houſe with thappurtenances be bequeathed thereby, the lands belonging to the Houſe or uſed with it doe paſſe, though yet they would not ſo doe, by ſuch words in any leaſe, deede, or grant, yet by ſome Civilians or Canoniſts, the Orchard belonging to an Houſe ſhall not paſſe by the onely gift of the Houſe without ſome words, ſhewing the intent of the Teſtator ſo to bee; or except one gate or doore leade as well to the Orchard, as to the Houſe, but ſome other of them hold that it doth paſſe without any ſuch helpe of circumſtance, ſo as it bee adjoyning to the Houſe. Sum. Silv. 186.

If a leſſee for yeares give his terme by his will to *A.* hee ſhall have it without paying any rent, for the Executors ſhall pay it for him, as *I* finde in the Summiſt, but againſt reaſon me thinkes. Ibid. ut ſupra.

If one bequeath his indenture of leaſe, his whole ſtate in that leaſe paſſeth. So if one

bequeath his obligation or other ſpecialty, the debt or duty it ſelfe ſhall go to the legatee; and by the canon or civill law the very action it ſelfe paſſeth, *viz.* as I conceive, ability to ſue the debtor in his owne name; but in our law it is otherwiſe, the ſuit muſt be in the executors name, for a debt or thing in action cannot be aſſigned except by or to the King, and only at the common law is the debt recoverable; but the Spirituall Court may force the executor to ſue or let his name be uſed in the ſuit for and by the legatee.

Ibid. ut ſupra.

If one bequeath all his moveables, debts due to him are not bequeathed, nor corne, nor fruit growing on the ground, nor ſtone, nor timber prepared for building, as the Canoniſts and Civilians hold.

Yet 48. E. 3. 14, 15. It is admit. that ſuch a diviſee of all goods after debt paid, ſhall have a duty reſting in account.

On the other ſide, if one bequeath the moiety of all his goods, the legatee ſhall have only the moiety of that which remaines after debts payed, for that only is to be accounted the teſtators which he hath *ultra æs alienum.*

Cuz. 36 Hen. 8. Dy. 59.

By a bequeſt of all utenſils or houſehold-ſtuff, plate nor jewels are not given.

Dy. ib. ſupra.

If one bequeath to his wife all her apparell, ſhe ſhall not have as ſome Civilians ſay, her ornaments of gold or ſilver, by which is meant as I take it, chaines, jewels, bracelets, rings, &c. but others are of contrary opinion, except they be ſuch things as are not lawfull for her to weare.

Sum. Silv. 286.

If a Bed be given by a will, *Venit ornamentum*

Ibid.

tum ejus, saith the Civilian, that is, the furniture thereof passeth, *viz.* not only the bed, bedsteed, bedcloaths, but also the curtains and valents, as I take it. But I think that by gift of a Coach by will, the Coach-horses passe not, yet perhaps the furniture of the Coach-horses may passe as appertenant to the Coach; for so I think they shall do, rather then by bequest of the Coach horses without the Coach.

If one bequeath to *A*, meat, drink, and clothing, or *alimenta*, he shall have, saith the civill law, also lodging, habitation, and all things necessary for the maintenance of life, *viz.* as I take it, fire and washing, &c. Ibid.

If one bequeath to his daughter ten pounds a yeare for her apparreling, and she demandeth none in foure yeares, now shall she not after that time have the arrerages of this ten pounds by yeare for the time passed. Ibid. b.

If a man bequeath one of his horses or cowes, not naming which, to *I. S.* he is to chuse which he will, so it be not the best of all, saith the civill law, and perhaps the mention of that exception growes out of respect to the hariot, which the Lord should have, or the mortuary which the Parson should have. Ibid.

A man bequeathes thirty pieces of twenty shillings to *A*, twenty to *B*, and ten to *C*, to be had in such a Chest or Casket, and it is found after his death, that there be but thirty in all in that casket or box, now each shall be abated ratably, saith my summist, so as *A* shall have Ibid.

fifteen, *B* ten, and *C* five, and this ſtands with good reaſon and juſtice, for ſo each hath a proportionable part. And it were reaſonable, that it were by Parliament eſtabliſhed for law, that all both legatees and creditors ſhould be payed in like proportion, where the ſtate will not ſuffice for full payment of each, rather then that an executor ſhould have power to pay one all, and another nothing, yet if the teſtator left ſufficient to make good all thoſe ſixty pieces bequeathed, *Quæ.* if that which is wanting in the casket ſhall not be ſupplyed and made up, for if the caſes following found with the ſame author be good law, it ſhould ſeeme ſo to be.

Sum. Silv. 286. If one, ſaith he, bequeath to *I. S.* that which is another mans, and whereto the teſtator hath no right, then ought his executor to buy it, and give it to the legatee, or elſe ſatisfie him to the full value, and this not only by the civill, but alſo by the canon law, and in *foro conſcientiæ*, ſaith my author.

Ibid. 287. Againe, if *A* bequeath to *B* ſuch an horſe by name, and after ſels away that horſe, and dyeth, now is his executor bound to anſwer the value thereof to *B*; and if the teſtator after his ſale of that horſe had bought another, and called him by the ſame name as the firſt, now ſhall this later horſe paſſe to *B*, ſaith the book, except it can be proved that the teſtator ſould the former horſe of purpoſe to revoke his will touching that bequeſt.

So

So againe finde I, that if one having but a moity or one halfe of Green close, or of a stack of corne, or other chattell, doth give the whole, so as the words be apparant to reach to more then his moiety, then must the executor buy out the others part for the legatee, or give him the value; but if the words be but generall so as they may be reasonably satisfied with the testators part, no supply shall be made. So also if one having goods in pledge bequeath them, it shall be construed to extend no further then his right. Ibid. 286.

A bequest is made of an hundred pounds to be payed at a future time, *viz.* divers yeares after the testators death; a question is made by the Summist, whether the profit of the money in the meane time, shall go to the legatee or the executor, and he resolves with this difference, if the day were given in favour of the legatee being an infant, who could not safely receive it any sooner, then he shall have the profit; but if the respite of payment were in favour of the executor, then shall the legatee have but the bare summe without any addition of meane profits. Ibid. 284. a.

If one bequeath all his terme or goods to his executor for payment of his debts, or debts and legacies, it is a void bequest, because it is no more then the law would say if he had sayed nothing. So if it be generally to performe his will. 15 Eliz. Dy. 331. Plow. Com. 545. b.

If one seised in fee simple of land bequeath Co. lib. 8. 96. a.

it

it to his executor to pay debts, the executor hath no ſtate of freehold; for if he ſhould, then it muſt be either for life, which might end by his quick death before debts payed, or in fee-ſimple, which would carry away the land for ever from the heire, where perhaps a few years profits might ſuffice to ſatisfie the debts, yea then by the death of the executor the land ſhould diſcend to his heire, and not go to his executor, who would be executor of the firſt teſtator.

By deed or word in life.

If one give or grant all his goods having leaſes for yeares as well as moveables, the leaſes ſhall not paſſe, as was held in the time of *Ed.* the 6. And ſo alſo was it admitted in *Portmans* caſe, for the word *bona* comprehendeth only moveables by the better opinion there. But the point in that caſe was pertinent to this place, *viz.* a bequeſt in a will of all the teſtators goods, and whether thereby a leaſe for yeares paſſeth or not, was divers times debated, but not reſolved, the Judges differing in opinion in that point, but in another point which made an end of the caſe, all agreed. Yet the better opinion was as I finde in my report, that a leaſe would paſſe by ſuch words in a will though not in a deed or grant by word otherwiſe made, for that legacies are demandable in the Spirituall Court, where *bona & catalla* are taken for all one. See alſo the ſtate of *Marlbr.* giving an action to the ſucceſſor *ad repetenda bona predeceſſ.* Yet an *eject. cuſtod.* hath been

4 E. 6. Bro. Done, &c. 43.

Tr. 37. Eliz. in ba. reg. Portm. ver. Simmes or Willis, divers times argued.

Cap. 28.

been maintained thereupon: ſo alſo upon the ſtat. for executors *de bonis aſportatis in vitate-ſtatoꝛ.* hath it beene reſolved, and where adminiſtration is granted, it is only *omnium bonorum*, without ſpeaking of chattels, yet hath the adminiſtrator intereſt in leaſes as well as moveables. On the other ſide the *ſtat. de prerog. reg.* mentioning only forfeiture *de catallis* is cleerely extended to moveables, ſo alſo in the writ of affize *de catallis quæ in eo capta fuerint*, and in the writ of execution upon a ſtat. there is only the word *catalla*, and not *bona*, and in the caſe reported by *Kelway temp. Henry* the 7th. it ſeems *bona & catalla* were taken for *ſynonyma* or all one. It doth not appeare that theſe ſtat. and writs were alleadged or conſidered of *temp. Ed.* 6. but in *Portmans* caſe the moſt of them were.

4 E. 3. cap. 7. So the ſtat. 5 R. 2. ca. of forf. of goods by thoſe who go beyond the Sea.

cap. 16.

In all theſe goods are comprehended

13 H. 7. Kelw. rep. 35. a.

If one will that his wife or any other ſhall have or hold or enjoy the moiety of his leaſe with his executor. This implyeth not that the executor have the other moity as a legacy alſo, but otherwiſe as the law caſts it upon him, no more then where the moiety of fee-ſimple land is deviſed to the younger ſonne, this ſhall not make the elder ſonne to have the other moiety otherwiſe then by diſcent, as betweene *Low* and *Charter* was conceived. But there being a *Proviſo* in the wives bequeſt, that if ſhe married from the houſe, then &c. *Popham cap.* Juſtice held, that if ſhe married at all, this was a marrying from the houſe, for ſhe was no longer

Low and Carters caſe Tr. 37 Eliz. in ba. reg.

widdow of that house, though she married with one of that kindred, and who had no other house, but would dwell in the bequeathed.

Cap. XX.

Of the Executor of an Executor.

I Should bee taxed of omission, if I should not shew whether the things fore-spoken of Executors immediate, extend also to the mediate or more remote Executors. Assuredly, were *I* not by the books otherwise informed, *I* should thinke it somewhat strange, that the mediate Executor in the fourth, fift or further degree should not by the rules of the common Law, stand in like plight Executor to the first Testator, as the first and immediate Executor, aswell as the heire, and assignee in the third or thirteenth degree is capable of all advantages in like sort as the first and immediate heire, and assignee. And indeed wee finde both in the time of *Edward* the 2. and *Edward* the 3. Execution sued out upon a judgement, and Statute by an Executor of an Executor, and why hee might not aswell maintaine an action of debt, &c. *I* see not. But *I* must confesse, *I* finde both bookes to the contrary before any Statute made in the point, and after an act of parliament to enable them to bring actions, and to make them subject to actions, yet the Statute speakes

See Plow. 184. a Debt against the Executor of an Executor

19 Ed. 2. & 14. Ed. 3. Fitzh. Executor 87. & 163.

11. Ed. 3. & 13. Ed. 3. Fitzh. Ex 98. 92. 25. Ed. 3 cap. 5.

ſpeakes nothing of conferring upon them the Teſtators goods. Now if they had title to them before that Statute and without the helpe of that Statute, it is ſtrange if they ſhould not bee ſuable for debts. But ſince that Statute, and at this day where by a will a ſpeciall truſt is recommended to an Executor, as to ſell land, &c. This not performed in his life time, ſhall not be performable by his *Executor*, contrariwiſe of an intereſt, as to take the profits of lands for certaine yeeres towards payment of debts, and legacies: and where the ſtat. *temp. H.*8. gives remedy to Executors for recovery of rents of inheritance behind in the Teſtators life, *I* doubt not but executors of executors are within the equity as well as within the Stat. 9. *Ed.* 3. *cap.* 3. that the executor who appeares at the grand diſtres ſhall anſwer alone. Yet the ſtatute *Weſtm.* 2. *cap.* 23. for executors was taken not to extend to executors of executors. *Quod non eſt lex.* So as now in all caſes except of ſpeciall truſt or authority, without the office of executorſhip, The executor of an executor, how farre ſoever in degree remote, ſtands as to the points both of being, having, and doing in the ſame ſtate and plight as the firſt and immediate executor.

19.H.8.9.10. 4.El.Dy.210. 32.H.8.cap. 37. So 32.H.8. 28. leaſes. And 32. H. 8. cap.34. Conditions, & 13.El. cap. 5. & 27. Eliz.cap.4. Of fraudulent conveyances. 21.H.8.cap.15. for falſifying recoveries. 39.H.6.45. 7.E.3.62.

Cap. XXI.

Touching Administrators.

OF theſe alſo as ſtanding in much affinity with executors, it may bee by ſome expected that *I* ſhould have treated. But firſt my excuſe is, that theſe of executors onely having growne to ſo great a bulke above expectation, *I* was unwilling to inlarge it further. Secondly, that which in the points of having, and doing is before ſet forth, and ſhewed touching executors, may bee applied to, and underſtood of adminiſtrator, sthough not what is ſpoken of being, and unbeing, or revocation of executorſhips, and other circumſtantiall points.

Laſtly, *I* may perhaps if theſe finde good acceptance, adere long that which appertaineth to Adminiſtrators diſtinguiſhed from Executors, or wherein they ſtand in different ſtate.

Chap.

Cap. XXII.

Conſiderations in conſcience touching payment of Debts, Legacies, and the preferring or reſpect of perſons.

TO the advertiſement what courſe executors are to hold in their payments, I thought good to adde this in *foro conſcientiæ*. That when as it ſhall ſtand in the executors will and election to pay whom he will, and as he will in reſpect of equality in the dignity and degree of the debts, all being for the purpoſe by ſpecialty, and none of record, and yet he hath not wherewith to pay or ſatisfie all; Here he may have three wayes or courſes in his eye.

First, where there is equality in the honeſty and conſcience of the debts; there except in the ability of the paties to beare loſſe, the diſproportion may otherwiſe occaſion, me thinks it ſhould be moſt honeſt and juſt to pay every one proportionably, and to let the loſſe of every one to be equall: and the juſtneſſe of this is taught by the law, which gives the *audita querela* for equall contribution in bearing of loſſe by them who ſtand in equall degree: ſo of legacies. 1

The poverty and inability of ſome, and the plenty of others, may in *foro conſcientiæ* juſtifie the paying more to one and ſuffering him to loſe leſſe (if any thing) then another. For as 2

the

the widowes mite was a greater gift, ſo a greater loſſe then more out of abundance. Where charity findes, or may finde place or neerneſſe to place of giving, it may find greater motives of preſerving from loſſe, So of legacies.

3 The nature of the debts, and ſo ſometime of legacies, may be ſo different, as thence may ſpring a juſt motive to diſproportion payments, to pay more to one then another, rate for rate, and ſo to ſuffer one to loſe more then another. One debt may perhaps be uſe for money, or at leaſt money lent for uſe, another may be money freely lent. Another debt for land of inheritance bought; another debt for a leaſe, chattels, or moveables, come to the executor. The firſt merits the leaſt reſpect, next the ſecond, then the third, and the laſt the moſt. But where without any of theſe motives there is not equality held in payment, *Peccatur* (as I think) *in conſcientiam*. But let every one ſtand or fall by or to his own, or to him who is greater then his conſcience. This equality S. *Paul* in another caſe recommends to the *Corinthians*. And *Salomon* whileſt no inequality appeared in the point of right, ſhewed his diſpoſition to have made an equall diviſion of the child betweene the mothers, who were joynt claymers and competitors for it.

2 Cor. 8. v. 14.

See more of Conſcience, *Doct. & Stud.*

FINIS.